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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-6740

ROBERT BULLINGTON, Petitioner

vs.

STATE OF MISSOURI, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI

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SUPREME COURT OF THE UNITED STATES

ROBERT BULLINGTON, Petitioner	)	
vs.	)	No. _____
STATE OF MISSOURI, Respondent	)	

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

TO: THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Robert Bullington, the petitioner herein, prays that a Writ of Certiorari issued to review the judgment of the Supreme Court of the State of Missouri, entered in the above entitled cause, on February 11, 1980. Petitioner's Motion for Rehearing was denied on March 11, 1980.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Missouri is cited as 594 S.W.2d 908 (Mo. 1980). Being Appendix B attached hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Missouri making its Rule of Prohibition requested by the State of Missouri absolute on February 11, 1980. A timely Motion for Rehearing was denied on March 11, 1980. The jurisdiction of this Court is envoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

This cause presents the following questions of interest and importance which warrant and necessitate the attention of this Court, to-wit:

A. Is it constitutionally permissible under the principals of double jeopardy and collateral estoppel for the State of Missouri to

seek the death penalty upon the retrial of a murder case wherein:

(a) The jury at the penalty phase of the first trial was instructed to assess punishment at death only upon a finding beyond a reasonable doubt of the existence of certain aggravating circumstances enumerated in the Statute 565.012.2 R.S.Mo. 1977; and

(b) The jury assessed petitioner's punishment at life imprisonment only; and

(c) The State has advised the Missouri Supreme Court that the aggravating circumstances and evidence at the second trial would be identical to that presented to the jury at the first trial.

B. Can the State of Missouri seek the sentence of death at petitioner's second trial when the jury at his first trial assessed punishment against him at life imprisonment without violating the constitutional principals that the sentence at petitioner's second trial cannot be excessive and disproportionate to the sentence imposed at his first trial and the sentence of death cannot be imposed in an arbitrary and capricous manner. Gregg v. Georgia, 428 U.S. 153 (1976) and Furman v. Georgia, 408 U.S. 288 (1972).

C. Can the State of Missouri seek the death penalty against petitioner when the aggravating circumstances pled by the State of Missouri in its Notice of Evidence in Aggravation, to wit:

> The offense was committed by a person who has a substantial history of serious assaulted convictions;
> and
> The offense was outragously or wantonly vile, horrible or inhuman in that it involved depravity of mind;

are unduly vague and overbroad in violation of the due process clause of the XIV Amendment to the Constitution of the United States and Godfrey v. Georgia, No. 78-6899, decided on May 19, 1980.

D. Does permitting the State of Missouri to seek the penalty of death at petitioner's retrial, after the jury at his first trial returned a sentence of life imprisonment only, needlessly chill the exercise of his right to trial by jury at his second trial as guaranteed him by the V, VI, and XIV Amendments to the United States Constitution and the exercise of his right to seek a trial by a jury reasonably representative of the community.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fifth, Sixth, Eight and Fourteenth Amendments to the Constitution of the United States. The statutes involved are ■■557.036.2, 565.001, 565.006, 565.008 and 565.012 of the Revised Statutes of Missouri, 1977.

STATEMENT OF THE CASE

On December 9th, 1977, an indictment was filed in the Circuit Court of St. Louis County, State of Missouri, charging the petitioner herein with Capital Murder, a crime punishable by death or life in prison in the State of Missouri. He was also charged therein with kidnapping, armed criminal action, burglarly first degree and two counts of flourishing a dangerous and deadly weapon, On July 7, 1978, the State of Missouri filed its Notice of Evidence in Agrravation advising the Court and the petitioner herein of its intention to seek the death penalty if there was a conviction of Capital Murder.

On October 11, 1978, petitioner was found guilty on all counts and on October 12, the second stage of the bifurcated trial was commenced to consider punishment on the charge of Capital Murder. The jury was instructed that pursuant to 565.012.2 R.S.Mo. they could return a sentence of death only if the State proved beyond a reasonable doubt the existence of at least one of two alleged aggravating circumstances. After presentation of evidence, argument and due deliberation the jury returned their verdict assessing petitioner's punishment at life imprisonment. Petitioner thereafter filed a timely Motion for a New Trial and on February 13, 1979, the trial court granted petitioner's motion based on State of Missouri v. Duren, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), and ordered a new trial. Thereafter, the State of Missouri filed its Notice of Evidence in Aggravation identical to that filed in the first trial. On March 12, 1979, the petitioner filed his Motion to Strike Plaintiff's Notice of Evidence in Aggravation and his Motion to Exclude from Trial Evidence in Aggravation of Punishment contending that the State's Notice should be quashed for the following reasons:

> That the plaintiff's Notice of Evidence in Aggravation, if not stricken, places defendant twice in Jeopardy in violation of the Fifth and Fourteenth Amendments to the Constitution

of the United States and Article 1, Section 19 of the Constitution of Missouri for the reasons that the determination of punishment has been made, and was not affected by the trial courts granting defendant's Motion for New Trial; that said determination of punishment constitutes a conviction of the offense of capital murder punishable by life imprisonment which is a lesser included offense of capital murder punishable by death; and that conviction of the offense of capital murder punishable by life imprisonment constitutes an acquittal of the offense of capital murder punishable by death.

That the plaintiff's Notice of Evidence in Aggravation and any presentment of said evidence is subject to the Doctrine of Collateral Estoppel in that the issue of punishment and aggravating circumstances considered in imposing said punishment has been previously litigated and imposed and remains undisturbed by the trial court's granting defendant's Motion for New Trial. Any admission of said evidence would lie in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 19 of the Constitution of Missouri.

Defendant further states that the plaintiff's Notice of Evidence in Aggravation if permitted to stand and the presentment of said evidence at defendant's new trial would: Have a chilling effect on defendant's right to appeal in that a determination of punishment has been made; subject defendant to relitigation of this identical issue and therefore effectively hamper and chill his rights to seek that relief guaranteed him by law; deny defendant his right to effective assistance of counsel; deny defendant due process of law and equal protection of the law; subject defendant to cruel and unusual punishment, all in violation of the Fifth, Sixth, Eight and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 10, 18(a), 19, and 21 of the Constitution of Missouri.

The Prosecutor has not advised defendant or the Court by said Notice of Evidence in Aggravation of any evidence or grounds not available or presented at the first trial.

On May 10, 1978, the trial court announced its intention to sustain petitioner's Motion to Strike and the State sought a Writ of Prohibition in the Missouri Court of Appeals, Western District. The State's request was denied by the Court of Appeals. Thereafter, the State sought a preliminary Writ of Prohibition from the Missouri Supreme Court which was issued in the Court on February 11, 1980, overruling all of petitioner's grounds as stated aforesaid, ordering the Writ to be made absolute.

REASONS FOR GRANTING THE WRIT

There are at least six compelling reasons why this Court should grant an issue of Writ of Certiorari to the Supreme Court of the State of Missouri in this case.

First, the retrial of petitioner in a proceeding wherein the death penalty is sought and litigated is specifically prohibited by the constitutional principals of double jeopardy and collateral estoppel. The immunities guaranteed to the petitioner by these principals make it imperative that the Court act prior to the trial, to prevent the wrong of forcing the petitioner to again risk his life at trial.

Second, this Court should act before the second trial to insure to the petitioner his right to an impartial and unbiased jury that has not been tainted nor its ranks reduced by death-qualifying them pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968).

Third, the issues before the Court are of such magnitude and importance that if the petitioner were to be convicted the questions presented for review would again be before the Court for final determination. The Constitution, justice and judicial efficiency demand that the Court grant the Writ of Certiorari and act on the question presented for review rather than postponing a decision.

Fourth, making a Rule of Prohibition absolute by the Supreme Court of the State of Missouri, is without question a final judgment which is appealable under 28 U.S.C. 1257(3) and as such is ripe for review.

Fifth, at present there exists between the various States substantial conflicts as to how the issues presented herein and the supporting constitutional principals hereinafter cited and relied on should be applied to similar situations as presented in the case at bar. Where the States disagree as to how to apply identical principals of constitutional law, especially under circumstances wherein a man's life is in question and where the law itself is subject to multiple interpretations by the various justices of this Court, it is imperative and necessary that the Court direct the States within prescribed limitations as to how the various constitutional principals involved should be applied in this and similar cases.

Sixth, this Court should not compel the petitioner to undergo the

emotional and mental torment of facing a sentence of death by refusing to grant certiorari. Under the facts presented herein a second trial requiring this petitioner to risk his life would be unduly harsh, cruel and unusual treatment and could deprive the petitioner of his right to effective assistance of counsel during the guilt phase of the trial.

ARGUMENT

THE RETRIAL OF PETITIONER IN A PROCEEDING WHEREIN THE DEATH PENALTY IS SOUGHT AND LITIGATED IS SPECIFICALLY PROHIBITED BY THE CONSTITUTIONAL PRINCIPALS OF DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL.

The immunities guaranteed to the petitioner by these principals make it imperative that the Court act prior to the trial, to prevent the wrong of forcing the petitioner to again risk his life at trial.

The Court has long recognized and held that the primary purpose of the double jeopardy clause of the Fifth Amendment is not to protect those defendants who have been convicted a second time unjustly but to prevent the prosecution of those defendants a second time unjustly. U.S. v. Wilson, 420 U.S. 332 (1975). It is just this risk of second trial that petitioner seeks to avoid. The substantial nature of the risk of a second trial and the cruelty in ignoring the risk have been well understood and have formed a body of law authored by this Court. In Breed v. Jones, 421 U.S. 519, 528 (1975) the Court stated: "...the risk to which the term jeopardy refers is that traditionally associated with actions intended to authorize criminal punishment to vindicate public justice...Because of its purpose and potential consequences, and the nature and resources of the State, such proceeding imposes heavy pressures and burden - psychological, physical and financial on a person charged. The purpose of the double jeopardy clause is to require that he be subject to the experience only once for the same offense." Clearly, only this Court can now prevent the complete erosion of the immunity afforded petitioner by the double jeopardy clause of the Fifth Amendment.

"A defendant who is required to await the completion of allegedly duplicative proceedings against him before being allowed to vindicate his double jeopardy has already and inescapably lost to a large degree the protection which the right was meant to afford him. It is in just such instances that the Supreme Court has recognized the propriety of interlocutory review." U.S. v. Alessi, 536 F.2d 978, 980 (1976). Inaction by this Court unquestionably means that petitioner's double jeopardy rights will be inescapably lost and substantial and severe prejudice will undoubtedly result.

> The...plea of double jeopardy is not a defense in the ordinary sense...the plea of double jeopardy...is an assertion of a constitutional grant of immunity. Therefore, it is more than a defense. The act which terminates the first trial germinates into life the dorment seed of constitutional immunity...the guarantee is that the person shall not be subject to the risk of a second trial...the immunity protection against being subjected to another trial - any part of another trial... Therefore reason and logic indicate that it is permissible to raise the plea of double jeopardy, if a person chooses, before the commencement of another trial and in whatever form is proper and available. McCabe v. Bronx County Court, 199 NYS2d 241 (1961), 94 ALR2d 1048, 1061.

Although petitioner has at every stage of the proceeding raised his argument and has succeeded in convincing the trial Judge, the Court of Appeals and two of the Justices of the Supreme Court of the State of Missouri, the only forum available for him at the present to shield him from the violation of his constitutional rights is this Court.

Any doubt, or reservation as to the propriety of reviewing decisions by lower courts applying the principals of the double jeopardy clause to foreclose and forbid a second trial have been completely and effectively removed by the Court's decision in Abney v. United States, 431 U.S. 651 (1977). Abney was charged with Conspiracy and Attempt to Violate the Hobbs Act under a single count indictment. He challenged the indictment as duplicitious and the District Court, in refusing to dismiss the indictment, required the Prosecuting authority to prove all elements of both offenses. Thereafter, the defendant was found guilty by the jury and appealed the conviction which was reversed by the Court of Appeals on evidentiary

grounds. In the order of reversal, the Court of Appeals directed the Prosecutor to elect between conspiracy and the attempt charges. The Government elected for conspiracy and plaintiff moved to dismiss on double jeopardy grounds. The Government argued that the Court of Appeals had no jurisdiction to hear the appeal from the trial court's ruling since the Motion to Dismiss was not a final decision within the meaning of 28 U.S.C. 1291. The Court, in an opinion written by Chief Justice Burger, while acknowledging the policy against piecemeal appeals recognized that double jeopardy motions and pretrial orders "fall within the so called 'collateral order' exception to the final judgment rule." The Court referred to three criteria to determine whether or not the claimed order is a final decision or a final decree under 28 U.S.C. 1257. First, has the order fully disposed of the Federal question raised; "in no sense did it leave the matter 'open, unfinished or inconclusive'." Second, "The decision was not simply a 'step toward final disposition of the merits of the case (which would) be merged in final judgment'; rather it resolved an issue completely collateral to the cause of action asserted." Finally, that "the decision had involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment; hence to be effective appellate review had to be immediate." page 659. The Court concluded that an order denying a Motion to Dismiss an indictment on double jeopardy grounds falls within the "'small class of cases' that Cohn has placed beyond the confines of the final judgment rule", page 659. As in Abney there can be no doubt that the order of the Supreme Court of the State of Missouri meets the criteria established by the Court and constitutes a complete, formal, and final rejection of petitioner's double jeopardy claim. Mr. Bullington has no additional or further steps that he can take in an effort to avoid the trial he claims is barred by the Fifth Amendment. By his Motion and by this Application and Petition he is "contesting the very authority of the Government to hail him into Court to face trial on a charge against him" Abney supra, page 659. It is the risk of trial that is to be avoided.

It is not sufficient to vacate an erroneous conviction after trial for it is mandated by the Fifth Amendment that it is the trial itself that is prohibited.

> "...Because of the focus on the 'risk' of conviction the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interest wholly unrelated to the propriety of any subsequent conviction." Abney, supra.

Even if Mr. Bullington is acquitted, convicted and sentenced to life imprisonment or a conviction is ultimately reversed on double jeopardy grounds, he has been forced to endure the trial prohibited by the Fifth Amendment. Petitioner has no choice; if he is to avoid exposure to being twice placed in jeopardy and thereby enjoy the full privileges and protections of the double jeopardy clause the decision of the Supreme Court of Missouri must be reviewed before the subsequent exposure occurs. The imperative nature of plaintiff's plea for consideration by this Court cannot be undermined or diluted by a claim from the State the principals annunciated in Abney supra, do not include the Doctrine of Collateral Estoppel. The incorporation of this Doctrine within the protection and immunities afforded by the Fifth Amendment double jeopardy clause was made complete in Ashe v. Swenson, 397 U.S. 436 (1970). Furthermore, in Harris v. Washington, 404 U.S. 55, 56, wherein the defendant had raised the issue of collateral estoppel prior to the second trial following an acquittal at the first, the Court held that "since the State Courts have finally rejected a claim that the constitition forbids a second trial of this petitioner, a claim separate and apart from the question whether petitioner may constitutionally be convicted of the crime with which he is charged, our jurisdiction is properly invoked under 28 U.S.C. 1257."

THE COURT SHOULD ACT BEFORE THE SECOND TRIAL TO INSURE TO THE PETITIONER HIS RIGHT TO AN IMPARTIAL AND UNBIASED JURY THAT HAS NOT BEEN TAINTED NOR ITS RANKS REDUCED BY DEATH-QUALIFYING THEM PURSUANT TO WITHERSPOON v. ILLINOIS, 391 U.S. 510 (1968).

If the petitioner were forced to undergo trial wherein the death penalty was improperly sought for the grounds hereinafter stated, the jury pursuant to Witherspoon v. Illinois, supra. would have been "death-qualified". If petitioner's contentions are correct, i.e., the State cannot seek the death penalty, the jury would have no role in the sentencing phase of the trial unless they found him guilty of an offense other than capital murder. It would accordingly be improper to voir dire the jurors concerning their personal beliefs and abilities to impose a death penalty. Although the issue of such a death-qualified jury has never been resolved in Witherspoon, supra., the Court suggested that competent evidence establishing that jurors not opposed to the death penalty are less than neutral with respect to guilt would be sufficient to show the selected jury would not be constitutional. 391 U.S at 520 n. 18. There exists many studies that now claim to establish that the voir dire examination of Venireman regarding imposition of the death penalty or "death-qualifying" the jury within the limits of Witherspoon, produces a jury also uncommonly willing to convict a man of an offense punishable by death. NEW DATA ON THE EFFECT OF A "DEATH-QUALIFIED" JURY ON THE GUILT DETERMINATION PROCESS, George L. Jurow, 84 Harv. L.Rev. 567 (1971); ON THE CONVICTION PRONENESS AND REPRESENTATIVENESS OF THE DEATH-QUALIFIED JURY: AN IMPERIAL STUDY OF COLORADO VENIREMAN, Edward J. Bronson, 43 U. Col. L. Rev. 1 (1970).

This Court is not faced with the question, left unsettled by Witherspoon, of whether any jury "death-qualified" in voir dire can in neutrality determine a defendant's guilt. The issue before the Court is a more narrow one; whether the jury has any role in sentencing following petitioner's sentence of life imprisonment at the first trial because death or life in prison are the only possible sentences that petitioner could receive. If it is determined that he cannot be resentenced to the penalty of death, the jury cannot properly be voir dired regarding that punishment.

The improper exclusion of even a single Venireman violates petitioner's right to a properly paneled jury. In Davis v. Georgia,

429 U.S. 122 (1976) the Court made it clear that regardless of how many jurors with conscientious or religious scruples against the death penalty are permitted to serve on a jury, the petitioner's death sentence may not constitutionally be executed if a single member of the Venire has been excluded in violation of the Witherspoon standard. Recognition by the Courts of the importance of assuring to the defendant a jury that is unbiased and unprejudiced would prohibit the State from death-qualifying a jury unless the death penalty could be properly sought. As it is petitioner's contention that this is not possible in this case, it would be a grievous and uncorrectable error to subject him to a trial wherein the jury was advised the death penalty was possible and Venireman were disqualified because of their personal beliefs concerning the death penalty. (Over twenty Venireman were struck for cause after being questioned by the State about their ability to impose a sentence of death at petitioner's first trial). Reversal of a sentence of death by an Appellate Court could not correct the error committed and a third trial would be required to insure the petitioner of a fair and properly impaneled jury. Clearly, the jury should only be death-qualified in those cases where death by execution is a possible or probable result. The strict standard of Witherspoon, and the resultant scrutiny on the part of the Courts to determine that its principals are not violated or disturbed in any way is readily apparent from a review of the cases enforcing those principals. Matthis v. New Jersey, 403 U.S. 496 (1971); Beck v. Illinois, 403 U.S. 946 (1971); Wayne v. Texas, 403 U.S. 946 (1971); Wigglesworth v. Ohio, 403 U.S. 947 (1971); Quintana v. Texas, 403 U.S. 947 (1971); Childs v. North Carolina, 403 U.S. 948 (1971); Jaggers v. Kentucky, 403 U.S. 946 (1971); Harris v. Texas, 403 U.S. 947 (1971), Adams v. Washington, 403 U.S. 947, (1971).

THE ISSUES BEFORE THE COURT ARE OF SUCH MAGNITUDE AND IMPORTANCE THAT IF THE PETITIONER WERE TO BE CONVICTED THE QUESTIONS PRESENTED FOR REVIEW WOULD AGAIN BE BEFORE THE COURT FOR FINAL DETERMINATION.

As indicated above, if the Court refuses to issue a Writ of

Certiorari to the Supreme Court of the State of Missouri, undoubtedly these same issues will be argued again if a conviction were to result. Barring a substantial change in the Supreme Court of Missouri's position or in the composition of the Court results similar to that cited herein could be readily expected. At this appeal petitioner would vigorously argue, as he is now, that allowing the State to proceed in its request for the death penalty severely prejudiced his right to a fair and impartial trial in front of a properly impaneled jury; hindered and unfairly influenced his trial strategy; seriously effected the assistance he was able to receive from counsel; prejudiced him in the eyes of the jurors; and subjected him to a second proceeding which was neither legal nor warranted. Obviously, the possibility exists that the jury would determine that petitioner should again be sentenced only to life imprisonment. Then, the Courts would need to determine whether or not allowing the jury to consider imposition of the death penalty; allowing the jury to be death-qualified; forcing the petitioner to make strategy decisions and to possibly waive trial by jury; and allowing the jurors a roving commission as to sentence could have or would have prejudiced the petitioner at the guilt phase of the trial. If the petitioner were able to convince the Court that such a prejudice did result and that the Supreme Court of Missouri was in error in making the Rule of Prohibition absolute and overruling the trial court and the Court of Appeals then, unquestionably, the petitioner would be entitled to a third trial. The second trial would have been a complete and unnecessary waste of time and energy in a judicial system already troubled by a congested docket. Mills v. Alabama, 384 U.S. 214 (1966). While there is obviously no way to determine how the Supreme Court of Missouri would rule if the petitioner were convicted and sentenced to death, under Missouri Statutes they would have exclusive jurisdiction and a repeat performance could be expected. Refusing to hear the questions herein presented would only result in an inexcusable delay that could seriously hamper both the State's and petitioner's right to fair and impartial trials.

Immediate rather than delayed review is the best way to avoid "the mistress of economic waste to delay justice" Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 at 124. In Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 483 (1975), the Court recognized that there are situations where the State Courts have made a final determination on the Federal issue and yet, there remain further proceedings pending in which the parties seeking review may prevail on the merits. This is true in the case at bar as petitioner may obviously be found not guilty of the offense of capital murder or may convince the jury at the guilt phase of the second trial that he should again be sentenced to life imprisonment. However, in this case, as in the Cox case, reversal of the State Court on the Federal issue would be preclusive of any further litigation during the penalty phase. Rather than delay its ruling and perhaps seriously effect a portion of the second trial, the Court should grant certiorari and review the issues involved. If the Missouri Supreme Court was wrong in its decision, there should be no guilt phase at all, life being the only possible sentence. Delaying the decision of petitioner's claim until after trial will "leave unanswered an important question" Cox at 485. See also Brady v. State of Maryland, 373 U.S. 83 (1963).

THE MAKING OF A RULE OF PROHIBITION ABSOLUTE BY THE SUPREME COURT OF THE STATE OF MISSOURI, IS WITHOUT QUESTION A FINAL JUDGMENT WHICH IS APPEALABLE UNDER 28.U.S.C. 1257(3) AND THAT SUCH IS RIPE FOR REVIEW.

Action by the Supreme Court of a state on a Writ of Prohibition, either denying or granting same, under the rule of Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 is to be considered an independent suit in relation to the criminal prosecution and the judgment of the Court finally disposing of such a suit is a final judgment within the meaning of 28 U.S.C. 1257. Rescue Army v. Municipal Court, 331 U.S. 549 (1947). In State of Missouri v. Taylor, 266 U.S. 200 (1924), although the Writ was denied, Justice Brandeis speaking for the Court stated: "The suggestion was made at the argument that this Court is without jurisdiction because the judgment below was not final. The contrary is settled.

The Application for a Writ of Prohibition is an independent advisary suit which was finally determined by the judgment under review." In Michigan Cent. R. Co. v. Mix et al, 278 U.S. 492, 494 (1929) the Court held that a denial of a Writ of Prohibition by the Supreme Court of the State of Missouri was a final judgment reviewable under certiorari. See also Bullock v. State of Florida ex rel Railroad Comm. of the State of Florida, 254 U.S. 513 (1921); Pan American Petroleum Corp. v. Superior Court of the State of Delaware in and for New Castle County, 366 U.S. 656 (1961); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Obviously, the making of the Writ of Prohibition absolute by the State of Missouri is a final determination on the issues now before the Court and renders petitioner's Application for Writ of Certiorari ripe for review.

THERE EXISTS BETWEEN THE VARIOUS STATES SUBSTANTIAL CONFLICTS AS TO HOW THE ISSUES PRESENTED HEREIN AND THE SUPPORTING CONSTITUTIONAL PRINCIPALS HEREINAFTER CITED AND RELIED ON SHOULD BE APPLIED TO SIMILAR SITUATIONS AS PRESENTED IN THE CASE AT BAR.

The States presently disagree as to how to apply identical principals of constitutional law and such disagreement has substantially grave results for a man facing possible execution. It is important that the Supreme Court interpose and direct the various lower tribunals in a manner that insures to all citizens of the various States and those defendants similarly charged the full unequivocal understanding of the constitutional protections and rights guaranteed to them. The role of the Supreme Court as arbiter among the various lower tribunals in the Federal system has assured to the citizens from various parts of the country equal status and protection of the laws. This Court in Fuller v. Oregon, 417 U.S. 40 (1974) noted in granting certiorari that Courts in other States in reviewing similar Statutes as the one in question have expressed views inconsistent with the decision of the Oregon Court and found that to be a compelling reason for the Supreme Court to grant certiorari. Obviously, conflicting decisions among the

State tribunals can result in repeated, irreconcilable and unalterable injustices upon the parties involved. This Court and only this Court can finally and adequately determine the extent to which the constitutional principals involved protect the petitioner and others in like situations. Without a final determination from this Court as to how the Fifth, Sixth and Fourteenth Amendments to the United States Constitution should be applied, the only result would be a substantial deprivation of constitutional immunities afforded other citizens but denied this petitioner. It is also petitioner's contention that the decision of the Missouri Supreme Court in making the Rule of Prohibition absolute is in conflict with other decisions of this Court and as such is reviewable. City of Pittsburgh v. Alco Park, Corp., 417 U.S. 369, 371, (1974). Obviously, one of the functions of the Supreme Court is to resolve and accomodate diversities and conflicts, especially when important Federal questions are involved. Charles Dowd Box Company v. Courtney, 368 U.S. 502 (1962). In DiBella v. United States, 369 U.S. 121, 122 (1962), the Court stated: "Not only disagreement among the circuits but dubieties within them, demanded an adjudication based upon searching consideration of such conflicts and confused views regarding the problem of considerable importance in proper administration of criminal justice." Obviously, the effective administration of criminal justice would require the Supreme Court's final decision on the points presented in this case. Calbo v. United States, 364 U.S. 611 (1961). If petitioner had been a citizen of the State of California, People v. Henderson, 60 Cal.2d, 482, 386 P.2d 677, (1963); People v. Payne, 142 Cal. Rpt. 320; People v. Johnson, 113 Cal. Rpt. 303; the State of Georgia, Ward v. State, 239 Ga. 205, 236 S.E.2d, 365 (1977); the State of Pennsylvania, Commonwealth v. Littlejohn, 433 Pa. 336, 250 A.2d 11 (1969); or the State of Florida, Robertson v. State, 258, So.2d 257 (1971), he would not be subjected to retrial for the penalty of death. The principals of constitutional law are identical. It is the decisions and the applications of these principals that differ. There is no reason in logic or justice that would require that petitioner,

as a resident of the State of Missouri should lose his life where other States would demand that it be protected by the Constitution that all are governed by. Indiana would appear to be the only State which is in agreement with the decision that is handed down by the State of Missouri. Layton v. State, 240 N.E.2d 489, (S.Ct. 1968), however, the Court in that decision, did not have to deal with the argument that there was an implied acquittal of a greater offense. Where the States disagree as to how to apply identical principals of Constitutional law, especially under circumstances where a man's life is at stake and where the law itself is subject to multiple interpretations by the various justices of this Court, it is imperative that the Court direct the States within the prescribed limitations as to how various constitutional principals should be applied in these and similar cases. Certainly, the luck of the locale should not determine the length of the life.

THE COURT SHOULD NOT COMPEL THE PETITIONER TO UNDERGO THE EMOTIONAL AND MENTAL TORMENT OF FACING A SENTENCE OF DEATH AT A SECOND TRIAL BY REFUSING TO GRANT CERTIORARI.

To subject petitioner to retrial with the possibility of a death sentence would seriously prejudice his right to a fair trial concerning guilt regardless of the jury's final sentence. As indicated earlier, the Witherspoon question will always present a problem in impaneling a jury on a death penalty case. It is petitioner's belief that such a question should not be allowed unless it is readily apparent that the death penalty can and should be sought in the case at bar. There can be no question that the exclusion of the jurors under the principals as outlined in Witherspoon for cause will undoubtedly change the composition and the demeanor of the panel that remains. Whether or not this change in composition and demeanor is enough in and of itself to mandate a new trial has not been decided. However, where the Court should never have allowed the Witherspoon question to be asked because the death penalty could not have been constitutionally sought, there can be no

doubt that the resulting strikes for cause severely prejudiced and hampered petitioner's right to an unbiased and impartial juror of his peers.

Obviously, if the petitioner faces death, substantial efforts and expense must be directed towards the punishment phase of the trial. Furthermore, at every stage of the guilt phase, certain questions of trial strategy must be decided with full consideration of the punishment phase of the trial. The same jury that hears the evidence of guilt hears the evidence of punishment. In the same vein, constant decisions made throughout the trial concerning trial strategy, cross-examination of witnesses, presentation of defense witnesses, decisions as to whether or not the petitioner should testify and the application of counsel's time would undoubtedly be altered if there is no possibility of a death penalty and no penalty phase proceedings. While these difficulties present themselves in all capital trials, it should not be forced upon the petitioner because of an erronous ruling by the Supreme Court of Missouri. The petitioner should not be compelled to face death a second time while the questions presented herein remain unresolved until this petitioner has undergone a trial unconstitutionally improper from its inception. No one can deny the emotional and mental torment facing the petitioner who has to undergo the rigors of a trial for his life. Emotional and mental strain, separate and apart from the financial and social crisis, would indeed be an unduly harsh and cruel result if the petitioner were to subsequently and successfully argue the death penalty could never be constitutionally obtained at his trial. The petitioner should be allowed to direct his attention to those details which would most adequately and effectively serve as a defense. The more areas he has to investigate the thinner his protection will be. Therefore, if he should not constitutionally be concerned about the death penalty he should not, realistically, have to be concerned with the death penalty.

One of the petitioner's primary contentions at all proceedings in the trial court as well as the Supreme Court of the State of Missouri was that the State would be precluded from seeking the death penalty

at petitioner's retrial by the double jeopardy clause of the Fifth Amendment to the Constitution of the United States and the principal of Collateral Estoppel. The Supreme Court of Missouri rejected these arguments citing Stroud v. United States, 251 U.S. 15 (1919) and Chaffin v. Stynchombe, 412 U.S. 17 (1973). It is petitioner's opinion that this is a misapplication of the law and finding in those cases. Both of these cases are readily distinguishable from the case at bar in that neither involve bifurcated proceedings nor did they involve specific findings of fact as a requirement before a particular sentence could be imposed.

There can be no question that the statutes of the State of Missouri require the finding of an existence of at least one of the ten aggravating circumstances enumerated in 565.012.2 R.S.Mo. 1977 before a sentence of death can be returned. In Stroud, supra, the jury was not instructed to find the existence of any factual circumstances to support any sentence permissible. Further, in Stroud, the petitioner never argued that the death sentence on retrial was prohibited by the double jeopardy clause, he argued that the retrial itself was prohibited. North Carolina v. Pearce, 395 U.S. 711 at 748. None the less, the circuitous and tightly reasoned evolution of the law surrounding the imposition of the sentence of death at present demands specific guidelines for the jury and specific findings of fact by the jury. When Stroud was argued, such requirements were non-existent and unheard of. Today they are constitutional requirements. It has never been this petitioner's contention that he could not be retried, it has only been his contention that he could not be sentenced to death and therefore placed twice in jeopardy. The Supreme Court of Missouri's reliance on a case that is sixty years old and decided in an era long before the present evolvement and development of law concerning the death penalty severely stretches its unbriefed holding across a legal history that mandates a review of such questionable precedent.

Chaffin, supra, as well does not involve a bifurcated

proceeding nor was the jury required to find the existence of certain facts prior to imposing a sentence. It is petitioner's belief that it is imperative that this Court decide whether or not the principals of law previously applied to noncapital cases or cases prior to the Court's decision in Gregg v. Georgia, 428 U.S. 153, (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976) are still applicable to the new sentencing procedures. Without question, these decisions direct the various State legislatures to enact statutes unlike any in the past. The decisions in Chaffin and Stroud cannot possibly control as precedent for the statutes under which petitioner was convicted. It is petitioner's contention that the Capital Murder statute in its entirety is written and the jurors are instructed in such a way as to create two separate offenses: Capital Murder Punishable by Life Imprisonment and Capital Murder Punishable by Death. 565.001 et seq. R.S.Mo. 1977. The former is necessarily a lesser included offense of the latter, because the elements of the two are identical with the exception that to sustain a conviction for Capital Murder Punishable by Death, the jury must find that one or more of the aggravating circumstances enumerated in the statute exists beyond a reasonable doubt. The Supreme Court of Missouri contends that "It is not our perogative to create separate crimes from those defined by statute". State ex rel v. Mason, 594 S.W.2d 908, 912 (Mo. 1980), however, it has always been the function of the Court not the legislature to determine whether or not a particular crime is a lesser included offense of another charge. It is the courts who are responsible for instructing the jurors on lesser included offenses, not the legislature.

The test for determining whether one violation is a lesser included offense of another is whether it is impossible to commit the greater offense charged in the information with having first committed the lessor. Obviously, as the only change in elements is the existence of one of the two enumerated aggravating circumstances, there can be no

question that Capital Murder Punishable by Life is a lesser included offense than Capital Murder Punishable by Death.

The fact that this finding was made through a bifurcated proceeding does not effect the nature of the jury's finding. The bifurcated hearing exists only as a procedural requirement necessary to insure that certain facts, admissible to establish aggravation, are not presented to the jury until the verdict is determined. These facts would naturally be of little, if any relevance to the question of guilt and could be extremely prejudicial to petitioner. Therefore, to insure to the State an opportunity to present otherwise inadmissible evidence, and to allow the petitioner to present evidence in mitigation, the trial is divided in two parts. There is, however, only one finding.

At petitioner's first trial he was sentenced to life imprisonment after presentation of evidence, argument and due deliberation. The jury was instructed by the Court that to impose a death penalty, they must "find and believe beyond a reasonable doubt" that the submitted aggravating circumstances existed. By finding that the petitioner should be sentenced to life imprisonment, the jury impliedly acquitted him of Capital Murder Punishable by Death. The State has conceded that the evidence to be presented at the punishment phase of the second trial is identical to that presented at the first. They have pled the exact same aggravating circumstances at both the first and second trial. Consequently, double jeopardy precludes a retrial on a charge from which a defendant has been acquitted, impliedly or otherwise. Green v. United States, 355 U.S. 184 (1957).

In Price v. Georgia, 398 U.S. 323 (1970) the defendant was convicted of the crime of voluntary manslaughter. After successful appeal and reversal, the State sought to retry on the greater offense of murder. The Court in reversing the conviction stated at page 327, "...the first verdict, limited as it was to the lesser included offense, required that the retrial be limited to that lesser offense." Petitioner's jeopardy on the greater charge of Capital Murder Punishable by Death has ended when the first jury was given a full opportunity to return a verdict on

that charge and instead reached a verdict on the lesser charge of Capital Murder Punishable by Life. The necessity for deciding petitioner's double jeopardy claim prior to trial is also evidenced in Price wherein on page 29, the Court stated "Although the petitioner (Price) was not convicted of the greater charge on retrial whereas Green was, the risk of conviction on the greater charge was the same in both cases, and the double jeopardy clause of the Fifth Amendment is written in terms of potentional risk of trial and conviction, not punishment." The same principal that conviction of a lesser offense is an acquittal of the greater was applied in State v. Troynack, 384 A.2d 306 (Ct. 1977) wherein the Supreme Court of the State of Connecticut ruled that a verdict of guilty of manslaughter in the second degree precluded a retrial for the crime of manslaughter in the first degree.

In People v. Mayo, 407 N.Y.S.2d 918 (N.Y. 1978), it was held that where a trial court submitted only robbery in the second or third degree, double jeopardy prevented a retrial on first degree robbery because the Court's decision was the functional equivalent of an acquittal of first degree robbery. Although the Missouri legislature admittedly did not classify the offenses separately, there is no question that in the minds of the jury and in the minds of the legal practitioner, the necessity of proving beyond a reasonable doubt the existence of one of the ten elements set out in the statute constitutes the additional element makes the crime of Capital Murder Punishable by Life a lesser included offense of Capital Murder Punishable by Death.

The principal of collateral estoppel, which is closely related to double jeopardy, distinguishes the case at bar from all those cases cited by the Supreme Court of the State of Missouri. Ashe v. Swenson, 397 U.S. 436 (1970). The State's attempt to seek the death penalty is in direct conflict with the holding in Ashe, supra, and with the policies behind the double jeopardy clause. Justice Stewart stated it clearly and concisely:

> "Collateral estoppel...stands for an extremely important principal in our advisary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be relitigated between the same parties in any future law suit."

and later,

> "The ultimate question to be determined, then, in the light of Benton v. Maryland, supra, is whether this established rule of Federal Law;as embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else the constitutional guarantee may embrace, North Carolina v. Pearce, 395 U.S. 711, 717, 23 L.Ed.2d 656, 664, 89 S.Ct. 2072, it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time, Green v. United States, 355 U.S. 184, 190, 2 L.Ed.2d, 199, 205, 78 S.Ct. 221 61 ALR.2d 119."

The double jeopardy clause and collateral estoppel were designed to "...protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged defense." Green v. United States, supra, 1.C.187. In Green, the defendant had been retried on a charge of first degree murder after he was previously tried and convicted of second degree murder. The Court found this constitutionally impermissible and recognized the right to be protected from such a retrial and holding that such protection was a vital safeguard which should not be given a narrow construction.

The State would not only have the petitioner run the gauntlet a second time, but is claiming a right to do so because its ammunition was not lethal enough the first time.

It cannot be successfully argued that the petitioner somehow waives his right to argue the effectiveness of a decision rendered by a jury successfully attacked as unconstitutional by him. The fallacy of this contention is apparent. One constitutional guarantee does not disappear because you seek to enforce another. The petitioner cannot be expected to choose between his rights. It is up to the State and the Courts to insure that he receives those rights, not be forced to select between them. Surely, if the petitioner had been acquitted of the charge of Capital Murder, the State could not contend that he should be retried for the offense a second time because of his successful attack on the jury. There is no difference here.

The issue was tried, argued, deliberated and decided. The State lost. They cannot reload and try to kill this petitioner a second time.

The Supreme Court of Missouri in its decision makes much of the alleged inconsistentcy of attacking the jury in one breath while arguing its findings should be upheld in another, and that petitioner "sought" (page 11) and "chose" (page 13) to place himself in the position of re-litigating his right to live. The petitioner is unwilling to indulge in such fiction.

On July 24, 1978, the petitioner filed his Motion to Quash the Jury Panel by attacking its method of selection. The same issue had been litigated and appealed to the Supreme Court of Missouri and the relief sought, i.e., to be tried by a constitutional jury was withheld from him in accordance with State v. Duren, 547 S.W.2d 476 (Mo. 1977). At every stage of the proceeding, the petitioner requested a constitutional jury, and the trial court, following the directives of the Supreme Court of Missouri, refused his request. Thereafter, the defendant repeated his contentions in his Motion for New Trial, although he recognized that the "damage was done".

Finally, this Court in reversing Duren, State v. Duren, 99 S.Ct. 664 (1979) granted to the petitioner the relief he had requested since well before his trial. It is indeed fiction to suppose or argue that he had any "choice". He "sought" a fair trial. It was denied him. The petitioner was not the moving factor but the pawn shuffled between the Courts. Now, the Supreme Court of Missouri, having been "instructed" to grant the petitioner a new trial seeks to force him to run the gauntlet a second time. This petitioner must once again risk his life at trial and agonize over whether his request for a constitutional jury may in fact kill him. Likewise, the majority opinion in the Supreme Court of the State of Missouri argues that under the instructions the jury could indeed grant mercy and sentence the petitioner to life imprisonment even if the existence of one of the aggravating circumstances had been proven, (Page 8). This is obviously, speculation in an attempt to determine what decision the jury made in the

case at bar, completely overlooking the instructions given to them. Ashe, supra, talks of a "rational jury". The Court would argue that this term must apply to the supposed findings of a jury if such findings were at all possible thereby denying the clear mandate in Ashe. The Supreme Court of Missouri further overlooked the fact that no mitigating evidence was presented at the second stage of the trial. It is petitioner's argument however that such a grant of mercy, if it did exist, itself embodies a finding of fact, i.e., that death is inappropriate in this particular case and therefore should be binding under the principal of collateral estoppel. In any case, the Court in Witherspoon v. Illinois, supra, page 522 n.20 forbade the States from employing procedures that "deliberately tipped (the scales) toward death". A system that would allow retrial everytime mercy is granted but disallows them whenever it is not, would have this forbidden scale-tipping effect.

Missouri Law provides that the Supreme Court of the State should review all death sentences and with regard to that sentence shall determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," 565.014(3) subsection 3, R.S.Mo. 1977. The identical language is included in the statutes for the State of Georgia which were found to be constitutional in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, at 890, wherein the Court stated:

> "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That Court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury findings of a statutory aggravating circumstance and whether this sentence is disproportionate compared to those sentences in similar cases." Section 27 2537(c) (Supp. 1975).
>
> "In short, Georgia's new sentencing procedures require a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in Furman, the Supreme Court of Georgia compares each death sentence with situated defendants to insure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of Furman. No longer should there be 'no meaningful

basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which is not'". 408 U.S. at 313.

And on page 892,

"Finally, the Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance and 'whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant'" Section 27-2537 (c) (3) (Supp. 1975).

"The provision for appellate review in the Georgia Capital-Sentencing System serves as a check against the random or arbitrary imposition of the death penalty. Inparticular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If the time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death."

Obviously, this is one of the main reasons that this court decided that the Georgia Statute did not violate the principals established in Furman v. Georgia, supra.

Because this provision appears in the Missouri Statute, the same considerations are in review and must be applied by the Missouri Courts. In the case at bar, the petitioner was tried on the identical facts that the State hopes to produce at the second trial. The jury basically heard the same evidence and in essence the same arguments that the second jury will hear. In the first trial, the jury found life to be appropriate. How can a sentence of death at the second trial be upheld in light of Gregg and the principals enunciated therein? How can anyone argue that a death sentence in the same case with the same defendant is not disproportionate or excessive in light of the first jury's original verdict? The Supreme Court of Missouri makes much of the fact that they cannot determine what the evidence will be at Bullington's retrial. Three times in response to questions by the Court, the State indicated that the evidence concerning the aggravating circumstances and the guilt phase of the trial will be identical at the second proceeding. The dissent of Judge Seiler re-emphasizes these

points and discloses the attempts of the majority opinion of the Supreme Court of the State of Missouri to avoid the clear mandate of Furman, and Gregg.

In a recent Georgia case, Ward v. Georgia, 236 S.E.2d 365 (Ga. 1977) the same factual situation as in the case at bar was presented to the State Supreme Court. Relying on the statute and Gregg, supra, the Court ruled the death penalty, if imposed on a retrail after defendant had received a sentence of life imprisonment at the first trial would necessarily be excessive and disproportionate. It is petitioner's position that this interpretation is the only reasonable interpretation available under the principals developed in Gregg and Furman.

The evidence at petitioner's first trial when reviewed in the light most favorable to the State established that the victim's body was found floating in a creek several days after her disappearance. The pathologis testified that death resulted from drowning; that there was no evidence of trauma other than a small superficial cut on her forehead; and no evidence of sexual abuse or contact.

The evidence in aggravation established that petitioner had been previously convicted of kidnapping and robbery.

If Furman, supra, stands for anything it stands for the proposition that a statute which gives to a Judge or a jury unguided discretion as to whether to impose death or life imprisonment is unconsititional.

The question thus becomes whether the "standards of the aggravating circumstances to be presented at petitioner's retrial are such as to conform with due process of law. The principals of constitutional law are clear enough. In Cramp v. Board of Public Construction, etc., 368 U.S. 285 (1961) the Court held:

> "We think this case demonstrately falls within the compass of those decisions of the Court which hold that '...a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed.

888. 'Words which are vague and fluid...may be as much as a trap for the innocent as the ancient law of Caligula' United States v. Cardiff, 344 U.S. 174, 176, 73 S.Ct. 189, 190, 97 L.Ed. 200. 'In the light of our decisions it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.' Champlin Refining Co. v. Corporation Commissions of Oklahoma, 286 U.S. 210, 243, 52 S.Ct. 559, 568, 76 L.Ed. 1062.

In Godfrey v. Georgia, No. 78-6899, decided May 19, 1980, the Court held that under factual circumstances presented the aggravating circumstance identical to the one pled by the State was unconstitutional, 565.012.2(7) R.S.Mo. 1977. This Court therein stated that:

> "...if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless (sentencing) discretion' Gregg v. Georgia, 428 U.S. at 196, n.47. See also Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas, 428 U.S. 262. It must channel these sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that make 'rationally reviewable the process for comparing a sentence at death'. As it is made clear in Gregg, a death penalty 'system could have standards so vague that they would fail adequately to channel the sentencing decision pattern of juries with the result that a patter of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur'. 428 U.S. at 195 n.46.

Clearly, there was no evidence at the first trial nor will there be any evidence at the second trial that the alleged crime involved torture or depravity of mind. Nor was there anything to indicate the murder, if indeed it was a murder, was anymore horrible, vile or wanton than any other murder must necessarily be.

The second aggravating circumstance, which is likewise identical to the aggravating circumstance which appears in the Georgia law is that the petitioner has a substantial history of serious assaultive convictions. There is no definition in the statute of the words "substantial" or "history". Likewise, there is no definition of what constitutes a serious assaultive conviction. The Georgia Supreme Court in Arnold v. State, 224 S.E.2d 386 (Ga. 1976) found that that standard was unconstitutionally vague and therefore unenforceable. If the legislature in the case at bar had believed that two convictions were enough it would have indicated that by phraseology such as "The defendant has been convicted

of more than one serious assaultive conviction." It is petitioner's contention that both the aggravating circumstances pled and relied on by the State of Missouri in an attempt to impose the death penalty are unconstitutionally vague and overbroad and do not provide the jury with "adequate guidance necessary under Furman and Gregg."

Petitioner was granted a new trial after this Court handed down its decision in State v. Duren, 99 S.Ct. 664 (1979). Subsequently, the State filed its Notice of Evidence in Aggravation depsite the fact that the issue of punishment, which was a separate trial had already been resolved. The effect of allowing the State to seek the death penalty is to force petitioner into foregoing his constitutional rights in order to avoid putting his life on the line. Furthermore, in Section 557.036.2 R.S.Mo. 1978 grants to petitioner an absolute right to have the issue of punishment submitted to the Court rather than the jury. The death penalty statute recognizes that either the jury or the court may sentence the petitioner. 565.006.2 R.S.Mo. 1978. If the Judge could not sentence petitioner to a punishment greater than life imprisonment under those principals as outlined in North Carolina v. Pearce, 395 U.S. 711 (1969), the petitioner is thereby faced with the incredible dilemma of (1) choosing whether or not the Judge or jury should determine the guilt or innocence and (2) choosing whether or not the jury or Judge should sentence him. If he chooses the Judge he will have to forego his right to trial by jury but will not face the harshest punishment of all. If he chooses the jury it could in fact cost him his life. This dilemma is dealt with at length by Justice Seiler in his dissent on pages 13-15.

The Supreme Court of Tennessee recognized this principal in Sommerville v. State, 521 S.W.2d, 792 (1975). Quoting from North Carolina v. Pearce, supra, the Court stated:

> "Due process of the law, then, requires that vindictiveness against the defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial and since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such retaliatary motivation on the part of the sentencing Judge."

The Supreme Court of Michigan has also concerned itself with this

chilling effect. See People v. Jones, 271 N.W.2d 515 (1978).

> "The two purposes for the resentencing restrictions imposed by Pearce, were to insure (i) that vindictiveness against defendant for successfully attacking his first conviction...would play no part in the sentence he receives after a new trial...and (ii) that apprehension of such vindictiveness would not deter a defendant's exercise of the right to appeal or collaterally attack his first conviction."

The Supreme Court of California in 1963 also ruled in People v. Henderson, 386 P.2d 677 (1963), that a harsher sentence at a second trial was prohibited by double jeopardy.

A jury found the defendant guilty of murder in the first degree and fixed the penalty at death. In a previous trial for the same offense, the defendant waived trial by jury and pled guilty to murder in the first degree. He was sentenced to life imprisonment. The Court relied on Green v. United States, supra, wherein the Supreme Court held that a defendant is not required to elect between suffering an erronous conviction to stand unchallenged and appealing therefrom at the cost of forfeiting a valid defense to the greater offense. A defendant faced with such a "choice" takes a "desperate chance" in securing the reversal of the erronous conviction. "The law should not, and in our judgment, does not place the defendant in such an incredible dilemma." The Court goes on to state "...a reversed conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial...". It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the legislature divides a crime into different degrees carrying different punishments or allows the Court or the jury to fix different punishments for the same crime. Quoting from Justice Frankford in the Green case:

> "...it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment."

The law in California pursuant to Henderson is:

> "Defendant's right to appeal from an erronous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the State has no interest in preserving erronous judgment, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal."

The Supreme Court in Pearce held that the imposition of a penalty upon a defendant for having successfully pursued his statutory right of appeal or collateral remedy would be "...a violation of due process of law" at 724, 23 L.Ed.2d 656, "...because vindictiveness against a defendant for successfully attacking his first conviction must play no part in the sentence he receives after a new trial" at 725. The Court in Blacklege v. Perry, 417 U.S. 21 (1974), applied those standards if vindictiveness to the prosecuting attorney. In that case, defendant was found guilty of a misdemeanor after a trial and appeal de novo to a higher court. The prosecuting attorney obtained an indictment with a felony assault charge rather than a misdemeanor for which he was originally tried. In granting a writ of habeas corpus, the Court through Justice Stewart stated:

> "A lesson that emerges from Pearce, Colton and Chaffin, is that the due process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of 'vindictiveness'."

The Court was simply following its earlier opinion in United States v. Jackson, 390 U.S. 570 (1968) striking down a kidnapping statute which authorized only the jury to impose the death penalty, stating:

> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. Cf. United States v. Robel, 389 U.S. 258, 19 L.Ed. 2d 508, 88 S.Ct. 419; Shelton v. Tucker, 364 U.S. 479 488-489, 5 L.Ed2d, 231, 237-238, 81 S. Ct. 247. The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive.

The analogy between Jackson and the case at bar is obvious. The Court struck down the statute because by its construction it necessarily infringed, impeded and chilled defendant's ability to freely exercise a constitutional right. Petitioner has a right to a properly and constitutionally impaneled jury as well as right to a trial before that jury. It is unconstitutional for the prosecutor to attempt to punish him for exercising his right.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Richard H. Sindel,
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A copy of the foregoing was mailed this 6th day of June, 1980, to Jim Cook, Prosecuting Attorney's Office, 7900 Carondelet, Clayton, Missouri, 63105.

EXHIBIT A

REVISED STATUTES OF MISSOURI 1977

557.036.2

The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless the defendant requests in writing that the court assess the punishment in case of a finding of guilt. If the jury finds the defendant guilty but cannot agree on the punishment to be assessed, the court shall proceed as provided in subsection 1 of this section. If there be a trial by jury and the jury is to assess punishment and if after due deliberation by the jury the court finds the jury cannot agree on punishment then the court may instruct the jury that if it cannot agree on punishment that it may return its verdict without assessing punishment and the court will assess punishment.

565.001.

Any person who unlawfully, willfully, knowlingly, deliberatly, and with premeditation kills or causes the killing of another human being if guilty of the offense of capital murder.

565.006.1

At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment, and by their verdict ascertain whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense.

565.008.1

Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

565.008.2

Persons convicted of murder in the first degree shall be punished by imprisonment by the division of corrections during their natural lives. Persons convicted of murder in the second degree shall be punished by imprisonment by the division of corrections for a term of not less than ten years.

565.012.1

In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence,

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence,

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstances found to exist.

565.012.2

Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of

conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

565.012.3

Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior ciminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of crime.

565.012.4

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

565.012.5

Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

EXHIBIT B

Supreme Court of Missouri

en banc

FEB 11 1980

IN OFFICE OF
CLERK SUPREME COURT

STATE ex rel. GEORGE R. WESTFALL,

Relator,

v.

HON. DONALD L. MASON, Judge, 16th Judicial Circuit,

Respondent.

No. 61499

I

Prohibition, to prevent respondent, the Honorable Donald L. Mason[1] Judge of the Sixteenth Judicial Circuit, from proceeding in the retrial of Robert Bullington for capital murder (the indictment charged numerous offenses) without allowing the prosecution to seek imposition of the death penalty.

Prior to trial in 1978 the State under § 565.006(2), RSMo 1978,[2] filed a "Notice of Evidence in Aggravation" announcing its intention to seek the death penalty in the capital murder charge. That trial resulted in a verdict of guilty on all counts including capital murder, October 11, 1978. A hearing was conducted the next day under the bifurcated procedure mandated by § 565.006, RSMo 1978, in which the jury was presented additional evidence in "extenuation, mitigation, and aggravation" of punishment. The jury directed that defendant be sentenced to life imprisonment without probation or parole for not less than fifty years.

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[1] Defendant was charged in the Circuit Court of St. Louis County by indictment with capital murder, kidnapping, armed criminal action, burglary first degree and two counts of flourishing a deadly weapon. The cause was transferred on change of venue to the Sixteenth Judicial Circuit in Jackson County, Missouri.

[2] See also § 565.006, RSMo Supp. 1979 (as amended) (effective date September 28, 1979).

Defendant's motion for new trial, challenging the constitutionality of the Jackson County jury panel, was sustained February 13, 1979, in light of the United States Supreme Court's holding in Duren v. Missouri, 439 U.S. 357 (1979). In preparation for Bullington's retrial the State has filed a second "Notice of Evidence in Aggravation" indicating its continued intention to seek the death penalty.[3] Responding, defendant moved to strike that "Notice" and to exclude from trial all evidence in aggravation of punishment. Respondent announced his intention to enter an order sustaining defendant's motion to strike, "to the extent that the state will not be permitted to seek the death penalty, should the defendant again be found guilty of capital murder." Relator then sought prohibition and for reasons now discussed, our preliminary rule heretofore entered is made absolute.

II

Respondent first contends prohibition is inappropriate procedurally because (1) relator (Prosecuting Attorney of St. Louis County) failed to allege the State had no adequate remedy at law, (2) that the state's limited right of appeal forecloses resort to prohibition, and (3) the issue does not involve the jurisdiction of the trial court. The first contention may be disposed of summarily. On October 2, 1979, by order of this Court relator was permitted to amend its petition and allege the State had no adequate remedy at law. As to respondent's second argument it is precisely because the state has an extremely limited right of

3 The notice advises the State will present evidence of two aggravating circumstances. First, that the killing was committed by a person with substantial history of serious assaultive convictions. § 565.012.2(1), RSMo 1978. Second, that the offense was outrageously or wantonly vile, horrible or inhuman. § 565.012.2(7), RSMo 1978.

appeal under § 547.210, RSMo 1978, and Rule 28.04 (now Rule 30.02) that extraordinary relief is proper to review interlocutory orders in criminal cases. See State ex rel. Corcoran v. Buder, 428 S.W.2d 935, 939 (Mo. App. 1968). Further, it is settled law that, "The writ is properly invoked to restrain the enforcement of orders beyond or in excess of the authority of a judge and to keep a court within the compass of its jurisdiction." State ex rel. Vogel v. Campbell, 505 S.W.2d 54, 58 (Mo. banc 1974). Because, as we shall presently discuss, neither the federal nor state constitutions nor Missouri law prevent Bullington from being subject to the death penalty on retrial, the trial court exceeded (or by its announced order would have exceeded) its authority in denying the state leave to seek imposition of the death penalty. Accordingly, prohibition lies. See State ex rel. Peach v. Bloom, 576 S.W.2d 744 (Mo. banc 1979).

III

The principal question for our determination is whether on retrial the death penalty under § 565.008, RSMo 1978 is barred as possible punishment by constitutional or statutory considerations. Respondent argues that because the jury in the first trial convicted Bullington of capital murder but sentenced him to life, the fifth amendment's prohibition against double jeopardy, the eighth amendment's proscription of cruel and unusual punishment, the fourteenth amendment's guarantee of due process and § 565.014.3(3), RSMo 1978, prevent the State from continuing to seek the death penalty. Long settled constitutional doctrine enunciated by this Court and reiterated in recent decisions of the United States Supreme Court leads to rejection of these challenges.

A defendant successfully overturning a conviction for a particular offense may in most instances be retried for that offense notwithstanding double jeopardy doctrine.[4] United States v. Ball, 163 U.S. 662, 672 (1896); Forman v. United States, 361 U.S. 416, 425 (1960); United States v. Ewell, 383 U.S. 116, 121 (1966). In some cases the rationale for such results has been couched in language of a waiver theory and in others that retrial constitutes but continuing jeopardy. However the rule is more usually described in terms of policy considerations. As Mr. Justice Harlan explained in United States v. Tateo, 377 U.S. 463, 466 (1964),

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

Essentially respondent argues that the federal double jeopardy clause prohibits not the retrial for the offense of capital murder (Bullington was convicted of that offense) but only the imposition of a more severe punishment upon retrial. Such contention was squarely rejected sixty years ago in Stroud v. United States, 251 U.S. 15

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[4] For a limited exception to this rule see Burks v. United States, 437 U.S. 1, 18 (1978).

(1919). There defendant[5] was convicted in a second trial for the murder of a prison guard and sentenced to life imprisonment by the jury. On retrial (his third) secured by Stroud, the new jury also convicted him of first degree murder and he was sentenced to death. The Court held the fact that Stroud was subjected to the increased punishment of death upon retrial did not place him in double jeopardy. In North Carolina v. Pearce, 395 U.S. 711, 720 (1969), the Court reaffirmed that a necessary corollary of the power to retry a defendant is the state's power to impose any legally authorized sentence upon reconviction, though greater than the sentence originally imposed. In refusing to depart from an unbroken 75 year line of decision supporting this principle, the court explained, "[T]he original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." Id. at 721. Recently the Court referred to Stroud as a "well-established part of our constitutional jurisprudence" and specifically declined an invitation to discard the principles stated there. Chaffin v. Stynchcombe, 412 U.S. 17, 24 (1973). Within the past year the United States Court of Appeals for the Sixth Circuit, following Stroud and rejecting this same argument, held that the fifth amendment does not forbid imposition of the death penalty on retrial of defendant for an offense upon which he was originally sentenced to life. Gully v. Kunzman, 592 F.2d 283, 289 (6th Cir. 1979), cert. denied, 99 S. Ct. 2850 (1979).

Despite respondent's stated intention to circumvent the effect of Stroud and the decisions following it, we find nothing in the federal constitutional guarantee against double jeopardy to prevent the state from seeking the death penalty on Bullington's retrial for capital murder.

Respondent quite untenably suggests that the legislature has bisected the crime of capital murder defined in § 565.001, RSMo 1978.[6] He argues that if life imprisonment is the penalty imposed, the offense is somehow transfigured and changed into a lesser included offense of capital murder with capital punishment and becomes the

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[5] Stroud was popularly known as the "Birdman of Alcatraz."

[6] Section 565.001, RSMo 1978, provides: "Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder."

crime of capital murder without capital punishment. Thus, he concludes, the jury's imposition of life imprisonment implicitly constitutes an acquittal of the greater offense. We are unwilling and indeed are unauthorized to indulge such fiction. It is not our prerogative to create separate crimes from those defined by statute. The simple fact is that capital murder under § 565.001, RSMo 1978 is a single crime with the range of punishment established by the legislature at life imprisonment without probation or parole for 50 years to the death penalty. Respondent's argument not only runs contrary to the decided cases, it ignores the statutory sections which define capital murder, prescribe the punishments for that offense, and detail the procedures for imposing those punishments. As noted above, there is but one crime defined as capital murder and the acts proscribed are specified in § 565.001. It was for that offense Bullington stood convicted following the first trial and it is for that offense he remains charged and awaits retrial.

As recognized by this Court in State v. Duren, 547 S.W.2d 476, 478-480 (Mo. banc 1977), federal constitutional requirements forbad mandatory imposition of capital punishment. In response to the constitutional directive that the jury's discretion in capital sentencing be "suitably directed" so as to minimize the risk of arbitrary and capricious application, Gregg v. Georgia, 428 U.S. 153, 189 (1976), and that consideration of the individual circumstances of each offender and crime was "constitutionally indispensable," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Missouri legislature enacted § 565.006 and § 565.012, RSMo 1978, providing for a presentence hearing following a conviction for capital murder at which time aggravating and mitigating circumstances as to the offender and the offense would be considered.[7] The existence of these

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[7] The United States Supreme Court clarified the constitutional standards for imposition of the death penalty in five opinions announced in 1976. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976). In these opinions the court struck down as unconstitutional the North Carolina and Louisiana statutes providing for mandatory imposition of the death penalty and upheld the capital sentencing procedures enacted by Georgia, Texas and Florida. As explained in Gregg, "[T]he concerns expressed in Furman that the penalty of death should not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." Gregg v. Georgia, 420 U.S. 153, 195 (1976).

sentencing procedures does not alter the fact that capital murder by statutory definition § 565.001, RSMo 1978, is a single offense, namely the unlawful, willful, knowing, deliberate and premeditated killing of another human being. The jury, in the § 565.006 proceeding, does not reconsider the issue of guilt, for that has been previously determined. Instead, at that stage they decide only the punishment to be imposed. In sum, the fact that the jury will consider the range of punishment for the offense of capital murder does not as respondent argues rend the crime of capital murder and create discrete offenses. The Stroud court dismissed such argument stating, "The fact that the jury may thus mitigate the punishment to life did not render the conviction less than one for first degree murder." Stroud v. United States, 251 U.S. 15, 18 (1919). See Redd v. State, 242 Ga. 876, 252 S.E.2d 383, 389 (Ga. 1979), cert. denied, 99 S. Ct. 2870.

Respondent also argues that the doctrine of collateral estoppel as embodied in the fifth amendment's protection against double jeopardy forecloses the state from seeking the death penalty if Bullington is again convicted of capital murder, and points to Ashe v. Swenson, 397 U.S. 436, 445 (1970). In Ashe the concept of collateral estoppel was elevated to the level of double jeopardy. There several poker players at their game table were robbed. Defendant was tried and acquitted for the crime of robbing player #1. An element necessary for conviction of that crime, (identity of the accused as the robber) was found against the State and defendant acquitted under his theory of alibi. In a later trial for the robbery of poker player #2 the Court deemed it double jeopardy to relitigate the identity issue. The Ashe Court stated that whether an issue of ultimate fact necessary for conviction is determined by a general jury verdict requires a court, "to examine

the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe v. Swenson, 397 U.S. at 444.

Respondent argues that a finding of no aggravation is necessary to the first jury's finding that defendant suffer life imprisonment rather than death for the crime of capital murder; hence the State is estopped from seeking to prove aggravation in the second trial. This contention is without merit for a number of reasons. A rational factfinder might well premise its imposition of life imprisonment on various factors other than the absence of aggravation. The applicable instructions drafted by the Supreme Court Committee on Patterned Criminal Charges and Instructions for death penalty proceedings demonstrate this option in the jury. Under MAI-CR 15.42 if the jury finds that at least one of the statutory aggravating circumstances exists, it must decide whether it is a "sufficient aggravating circumstance" to warrant the imposition of the death penalty. Even then the jury need not impose death if in its weighing process it intuitively feels the mitigating circumstance(s) tips the scale against the death penalty. MAI-CR 15.44. Finally, though the jury finds that sufficient mitigating circumstance(s) have not been shown, defendant is given the further benefit of our Instruction MAI-CR 15.46 which provides: "[Y]ou are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you." Thus the predilections of the jury as to mercy and the death penalty remain a part of the system within the limits and safeguards established by statute.

Clearly the first jury might have imposed life imprisonment in response to a defendant's plea for mercy rather than finding no aggravation. Ashe v. Swenson is inapposite here and the State is not precluded from seeking the death penalty by any aspect of the fifth amendment's protection against double jeopardy.

Respondent, relying on North Carolina v. Pearce, 395 U.S. 711 (1969), next argues that allowing the prosecution to seek the death penalty, should Bullington be reconvicted of capital murder, would violate principles of due process in that a finding of capital punishment by the jury at retrial would be "tainted by vindictiveness." However, Pearce is not controlling here. In that case, defendant's conviction was reversed through collateral attack but on retrial he was again convicted and when resentenced by the court received more severe punishment than that originally imposed. Id. at 713-714. The Pearce Court concluded, "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial . . . . [D]ue process also requires that a defendant be freed of apprehension of such a retalitory motivation on the part of the sentencing judge." Id. at 725. (Emphasis ours.) This exposure to possible vindictiveness of the sentencing judge does not occur in the jury sentencing process under Missouri's capital murder statutes.

The due process clause is not violated by all possibilities of increased punishment upon retrial, "but only by those that pose a realistic likelihood of vindictiveness." Blackledge v. Perry, 417 U.S. 21, 27 (1974). See Colten v. Kentucky, 407 U.S. 104, 116 (1972). Ludwig v. Massachusetts, 427 U.S. 618, 627 (1976). In this connection

the Supreme Court held recently that Pearce-like restrictions were inapplicable in jury resentencing at least where improper and prejudicial information regarding the prior sentence is withheld. Chaffin v. Stynchcombe, 412 U.S. 17, 28 (1973). The Chaffin court found the potential for vindictiveness in jury resentencing, de minimis for these reasons: First, a retrial jury in the normal course of events will be unaware of the disposition of the prior proceeding. Second, juries, unlike a trial judge, who has been reversed on appeal, will have no personal stake in the prior conviction and no motivation to engage in self-vindication on remand. Third, juries will not be sensitive to the institutional interests which might be promoted by imposing higher sentences after appeal as a means of discouraging meritless appeal. Id. at 26-27.

Respondent, in a final attempt to circumvent the clear import of Chaffin, suggests that because that case did not involve a bifurcated proceeding as provided under the Missouri capital murder statute, the holding there does not control our case. However, this overlooks the fact that Chaffin states:

> While some jury-sentencing States have adopted bifurcated jury trials, in which the jury assesses the punishment in a separate proceeding after a verdict of guilty has been rendered [citations omitted], bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing. It may make little sense to supply the jury with information about the defendant's conduct if the goal of jury sentencing is not necessarily to fit the punishment to the offender, and if the jury is, therefore, not concerned about matters considered pertinent to judicial sentencing.
>
> Petitioner and recent court of appeals cases suggest that an approximation of the Pearce limitations could be realized either by instructing the jury that it may return no verdict higher than the former sentence, or by empowering the judge to reduce the second sentence whenever it exceeds the former sentence. [citations omitted.] Although these alternatives would provide an absolute protection from the possibility of vindictiveness, they would also interfere with ordinary sentencing discretion in a manner more intrusive than contemplated by Pearce. They would achieve, in the name of due process, the substance of the result we have declined to approve under the Double Jeopardy Clause.

Id. at 28n.15.

Such constraints upon jury discretion as those urged by respondent would be particularly unfortunate in the capital sentencing area where individualized consideration of each offender is constitutionally required. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

Missouri decisions, prior to Chaffin, recognized that "vindictiveness" has no relevance to jury resentencing. See Spidle v. State, 446 S.W.2d 793, 795 (Mo. 1969). Kansas City v. Henderson, 468 S.W.2d 48, 52-53 (Mo. 1971), cert. denied, 404 U.S. 1004 (1971). Accordingly, we find that as a jury will decide whether Bullington should be subject to the death penalty if he is reconvicted of capital murder, there is no realistic likelihood of vindictiveness on retrial. It is appropriate to reemphasize that defendant has been awarded a retrial which he sought and it does not violate due process to permit such trial for the crime he was originally and still stands charged. Nor does the award of a new trial alter the range of punishment prescribed by the statute. The decision as to punishment under the prescribed procedure is that of the individual jury, not to be engrafted upon or controlling of a new jury not yet empaneled. To hold otherwise would distort the clear purpose of the statutory scheme which offers protection against aberrant results by establishing a system that allows the trier of fact (1) to determine guilt or innocence without the distraction of evidence irrelevant to that issue (§ 565.006), (2) if a guilty verdict is returned to consider facts in aggravation and mitigation as they relate to punishment (§ 565.006(2)), and (3) provides a system of mandatory review (§ 565.014) that guards against, among other things, a sentence imposed "under the influence of passion, prejudice or any other arbitrary factor." (§ 565.014.3(1)). This is not a deprivation of due process, but an extension to a high order of the process due the accused. The subsequent jury will decide the issues anew and it is their responsibility to determine guilt and assess the punishment upon conviction (§ 565.006.2).

Further, if on appeal reversal occurs "because of error only in the presentence hearing, the new trial . . . shall apply only to the issue of punishment." § 565.006(3). There is no suggestion in this language that on such new trial the range of punishment is restricted to life imprisonment only. To the contrary, the choice of punishment is the principal issue to be decided in such a new trial.

Respondent next contends the possibility of a harsher sentence on retrial would unconstitutionally chill defendant's rights of appeal. We do not agree. United States v. Jackson, 390 U.S. 570 (1968), cited by respondent as authority, involved a federal anti-kidnapping statute which allowed only the imposition of the death penalty following a jury trial. See 18 U.S.C. § 1201(a) (amended 1972). That statute was held to unconstitutionally deter the exercise of a defendant's fifth and sixth amendment rights to insist upon his innocence and demand a trial by jury. 390 U.S. at 581-583. Unlike the federal statute which singled for punishment by death that class of defendants who sought jury trials, the Missouri capital murder statutes draw no such invidious distinction.

Recent authority demonstrates that Jackson should be limited to statutes of the type which on their face penalize the assertion of constitutional rights. In Brady v. United States, 397 U.S. 742 (1970) and North Carolina v. Alford, 400 U.S. 25 (1970), defendants entered pleas of guilty to avoid the possibility of the imposition of capital punishment by a jury. The United States Supreme Court held that the fact a plea was entered to avoid the imposition of the death penalty by a jury did not ipso facto render the plea involuntary. Brady v. United States, 397 U.S. 742, 751 (1970; North Carolina v. Alford, 400 U.S. 25, 31 (1970). If the threat of the death penalty does not impermissibly coerce guilty pleas and encourage waiver of the plethora

of rights guaranteed in a criminal trial under the fourth, fifth, sixth and fourteenth amendments, we do not believe the possibility of capital punishment unconstitutionally chills a defendant's right to appeal. This view is supported by that expressed in Chaffin v. Stynchcombe, supra, at 35 where it is stated: "The choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction."

Respondent next contends that § 565.008, RSMo 1978, is unconstitutional because the death penalty permitted therein constitutes cruel and unusual punishment violative of the eighth amendment of the United States constitution and art. I, § 21 of the Constitution of the State of Missouri. This contention, first raised in defendant's Motion to Strike was renewed in respondent's brief before this Court with this language, "the death penalty, . . . is in all circumstances, a cruel and unusual punishment under both Federal and State constitutional provisions . . . " Respondent is quite mistaken, the death penalty is not per se violative of the eighth amendment. See Gregg v. Georgia, 428 U.S. 153, 187 (1976). Further, because the statutory procedures for imposition of the death penalty in Missouri are virtually identical to those contained in the Georgia statute challenged in Gregg no serious question remains as to their validity under the federal constitution. See Gregg v. Georgia, 428 U.S. 153, 196-207. Lockett v. Ohio, 438 U.S. 586, 604-605 (1978).

Thus we need examine only for the validity of § 565.008, RSMo 1978, under art. I, § 21 of the Missouri Constitution.[8] The ultimate question is whether the punishment is disproportionate to the crime for which imposed. State v. Agee, 474 S.W.2d 817, 822 (Mo. 1971); State v. Brownridge, 353 S.W.2d 715, 718 (Mo. 1962). In this connection it has been held that a punishment is not cruel simply because it is severe. Id. State v. Stubblefield, 157 Mo. 360, 58 S.W. 337, 339 (Mo. 1900).

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[8] Art. I, § 21, Mo. Const. provides: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

When considering the constitutionality of a punishment statute enacted by our legislature, we presume its validity and those who seek to invalidate it bear a heavy burden of demonstrating that it is either barbarous or excessive. Gregg v. Georgia, supra, at 175 (1975); See State v. Mitchell, 563 S.W.2d 18, 26 (Mo. banc 1978).

We are mindful that the legislature necessarily considered those who have fallen victim to violent crime within our society. Their lives have been taken without notice and no rigorous procedural safeguards protected them from premeditated attack and death. No crime is more disruptive of peace and order or so violative of the rights of the individual as murder. The spread of violent crime threatens the basic fabric of our Republic and surely all right thinking persons recognize that physical security of its members is among the first objects of an organized society. We cannot say that the death penalty is cruel and unusual punishment for those who unlawfully, willfully, knowingly, deliberately, and with premeditation kill another human being. This view finds wide support in the legislative enactments of sister states, as forty jurisdictions attach a penalty of death to certain categories of murder.

Given the extreme nature of the crime of murder, as well as the fact that the overwhelming majority of American jurisdictions allow imposition of capital punishment in specific instances, we will not substitute our judgment for that of our duly elected legislature in this question of policy. We hold § 565.008, RSMo 1978 does not prescribe cruel and unusual punishment in violation of art. I, § 21 of the Missouri Constitution.

It is next asserted that the death penalty may not be invoked at Bullington's second trial because § 565.008.2(7), RSMo 1978, which provides one of the two aggravating circumstances the state seeks to

prove at retrial, is unconstitutionally vague and overbroad in violation of the fourteenth amendment.[9] The United States Supreme Court, confronted by a similar argument in Gregg v. Georgia, 428 U.S. 153, 201 (1976), as to a Georgia statute (Ga. Code Ann. § 27-2534.1(b)(7)) with provisions essentially the same as ours, concluded that while it was arguable any murder involves "depravity," the language need not be construed in such a broad fashion. Hence this statutory aggravating circumstance was not found so wanting in precision that it rendered the capital sentencing procedure capable of arbitrary and capricious decision violative of the eighth amendment. We see no reason to find that our almost identical statutory provision violates the fourteenth amendment particularly when the statute and its application is subject to mandatory review by the Missouri Supreme Court in all capital cases.

Respondent's final claim is that § 565.014.3(3), RSMo 1978, forbids the prosecution from seeking the death penalty at Bullington's second trial. That statute mandates proportionality review by this Court and that we determine in each case the excessiveness vel non of the death penalty's imposition.[10] We reject the contention that when a jury in the first trial of a capital murder case imposes a life sentence, assessment of capital punishment by any subsequent jury is invariably excessive. Such argument is little more than a variant of the double jeopardy argument dealt with earlier in this opinion, but respondent, pressing the contention, relies in the main on

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[9] Section 565.008.2(7) provides: "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

[10] Section 565.014.3 provides that in the review of all cases in which capital punishment is imposed this Court shall determine: ". . .(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012, and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (Ga. 1977). Ward is distinguishable from the case at bar in that the evidence had been presented at the subsequent proceeding and that evidence "was essentially the same" as that presented at the first trial where the jury did not recommend a sentence of death. Id. at 366. No evidence has been adduced in the pending retrial of this cause and we will not indulge the speculation urged as to the State's or defendant's evidence at a future trial, this notwithstanding the argument that the "notice" contains the same general averments as the earlier "notice" and despite relator's statements in oral argument that the state intended to present the same evidence at Bullington's retrial. The evidence finally adduced depends upon the witnesses, not relator's expressed intention. Any rule or decisional pronouncement foreclosing on retrial additional proof in mitigation or aggravation within the scope of the notice, is quite unacceptable and we decline respondent's invitation to invoke such a rule as to a single phase of the proof, i.e., aggravation. More importantly we decline to follow the Georgia court in the construction of Missouri's death penalty statutes. Ward held that once a jury in a capital case finds life imprisonment, a jury sentence of death in any subsequent trial "is obviously disproportionate." Id. at 368. We are not persuaded to this point of view for a number of reasons. As noted above, not only may the proof vary in the second proceeding, but the jury which deemed a life sentence appropriate may well have been aberrant. It cannot be said that the findings of the first improper jury sound with finality as to aggravation or mitigation as our instructions explicitly allow the juror's individual values to be considered in the capital sentencing process. See MAI-CR 15.46. Also we have no record of the evidence from the first presentence hearing and cannot say what error may have occurred other than the fact the jury selection process

in Jackson County was constitutionally infirm. Further, if such record were before us the fact remains it would be impossible to predetermine the evidence emerging in the new trial and we consider it improper to predecide the result that should flow from the proof. Finally, if defendant's (respondent's) argument were accepted that the first jury's decision on punishment binds any later jury, the argument could be made that if the first jury decided on death as an appropriate sentence the second jury's consideration would be limited to only that punishment. Needless to say defendant would promptly abjure that result.

The rule is made absolute.

ALBERT L. RENDLEN, Judge

Morgan and Higgins, JJ., concur; Donnelly, J., concurs in separate concurring opinion filed; Welliver, J., concurs in result; Bardgett, C.J., dissents in separate dissenting opinion filed; Seiler, J., dissents in separate dissenting opinion filed.

Supreme Court of Missouri

en banc

DUPLICATE
OF FILING ON
FEB 11 1980
IN OFFICE OF
CLERK SUPREME COURT

STATE ex rel. GEORGE R. WESTFALL,)
)
Relator,)
)
vs.) No. 61499
)
HONORABLE DONALD L. MASON, Judge,)
16th Judicial Circuit,)
)
Respondent.)

CONCURRING OPINION

I would make a few observations on the issue of double jeopardy.

My Brother Seiler would, for constitutional purposes, and in a situation calling for a bifurcated proceeding, relate the prohibition against double jeopardy not only to the offense of capital murder of which Bullington was convicted but also to the punishment imposed for the offense of which he was convicted. He would reason that Bullington can be retried for the offense of which he was originally convicted because he waived the double jeopardy protection by attacking the validity of his conviction on Duren grounds--but Bullington cannot be subjected to a punishment greater than that assessed at his first trial because there was an implied acquittal of punishment by death.

In order to embrace such a position, capital murder must be treated as two offenses (capital murder where death may be imposed and capital murder where imprisonment for at least fifty years may be imposed) or it must be assumed that there are two "degrees" of capital murder (one sufficient to impose death and one not).

In my view, the discretion given by statute to assess punishment at less than death does not support either proposition. I find nothing in either constitution which would require that we construe capital murder as constituting two offenses or as being divided into degrees.

The jury finding in October 1978 that Bullington should be sentenced to life imprisonment without probation or parole for not less than fifty years was not a determination that any element of the offense of capital murder is lacking. The constraints of double jeopary are not involved here.

I would also make a few observations about imposition of the death penalty under § 565.008, RSMo 1978.

Article I, § 21 of the Constitution of Missouri provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." (Emphasis supplied.)

In my view, the taking of a life for a life is not always cruel. History teaches us that it is not unusual.

The taking of the life of a human being by another human being "unlawfully, willfully, knowingly, deliberately, and with premeditation" (§ 565.001, RSMo 1978) cannot be tolerated by organized society. Our Constitution promises that the "natural right to life" of all persons will be protected. Mo. Const. art. I, § 2.

The ultimate question is: May that protection be effected by the imposition of capital punishment? The arguments which swirl about us as to the validity of suggested justifications for the imposition of death as punishment (e.g., retribution and deterrence) make for fascinating reading but miss the mark. See S. Donnelly, A Theory of Justice, Judicial Methodology, and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility, 29 Syracuse L. Rev. 1109 (1978); and R. Gardner, Capital Punishment: The Philosophers and the Court, 29 Syracuse L. Rev. 1175 (1978).

However, it is my personal belief that an organized society that takes a life for a life as a part of its public policy is mistaken in its belief that it is promoting its own basic premise "that all government * * * is instituted solely for the good of the whole." Mo. Const. art. I, § 1.

Although I am compelled to concur, it is my view that taking the life of a human being "willfully, knowingly, deliberately, and with premeditation" (albeit "lawfully") by an organized society is socially

amoral. I think it will be self-destructive and that inevitably it will lower the quality of society and will be detrimental, if not devastating, to "the good of the whole." In warfare a fragile line sometimes exists between amoral killing and killing regarded as moral by world society. Here I think the line is not fragile but plain. Establishment of a studied public policy by which a whole community intentionally crosses the line into what I view as amoral killing, even though legal, represents a risk too great to itself for that community to assume.

In my view, banishment for fifty years (§ 565.008, RSMo 1978), with no concern for the probable fiction of rehabilitation, is an acceptable alternative. It would effectually excise the transgressor from our society without debilitating our society's collective concept of decency.

However, I have no authority to impose such views on the people of Missouri. To borrow from Mr. Justice Frankfurter: "As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting).

I have spoken of the death penalty in terms of <u>public policy</u>. It should be noted that constitutional concerns must be addressed by this Court, under authority of § 565.014, RSMo 1978, in each case where death is imposed as punishment.

I concur.

Robert T. Donnelly, Judge

Supreme Court of Missouri

en banc

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STATE ex rel. GEORGE R. WESTFALL,
Relator,
vs.
HONORABLE DONALD L. MASON, Judge, 16th Judicial Circuit,
Respondent,

No. 61499

DISSENTING OPINION

I dissent and concur in the dissenting opinion of Seiler, J. However, I wish to address the nature of our new capital-murder statute because I believe it differs in a substantive way from former murder statutes which permitted the death penalty as one of the punishments and thereby calls for different treatment by this Court.

Capital murder is not treated as two offenses. Nor do I think the dissent of Seiler, J., suggests that it is two offenses.

The old first-degree-murder statute, § 559.010, RSMo 1969, repealed Laws of Mo. 1975, p. 408, § A (hereinafter "old capital murder law") provided:

> 559.010. Murder in the first degree
> Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree. (Emphasis added.)

The punishment was to be arrived at and assessed in accordance with § 559.030, RSMo 1969, repealed Laws of Mo. 1975, p. 408, § A, which provided:

> 559.030. Trials for murder, verdict and punishment
> Upon the trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, under the instructions of the court, whether the defendant be guilty of murder in the first or second degree; and persons convicted of murder in the first degree shall suffer death, or be punished by imprisonment in the penitentiary during their natural lives; those convicted of murder in the second degree shall be punished by imprisonment in the penitentiary not less than ten years. (Emphasis added.)

The new capital-murder statute essentially copied the mental elements of the old capital-murder law, italicized supra, and designated the offense "capital murder" as follows:

> 565.001. Capital murder defined.--Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.[1] (L. 1977 H.B. 90 § 1) Effective 5-26-77

Elaborate procedures now appear in our laws whenever the death penalty is a possible punishment. §§ 565.006, 565.008, 565.012, 565.014, 565.016, RSMo 1978. The penalty section itself is § 565.008.1, RSMo 1978, and provides:

> 565.008. Death penalty, when imposed--life imprisonment, when imposed--minimum of fifty years to be served, when--first and second degree murder, penalties for.--1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

One must carefully read the numerous provisions relating to the procedures and required findings provided in the cited statutes to fully appreciate the qualitative difference between our old capital-murder law

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1. That part of repealed § 559.010, referring to homicides committed in the course of certain felonies "felony murder", became first-degree murder, § 565.003, RSMo 1978, punishable by life imprisonment, § 565.008.2, RSMo 1978.

and the present one. The differences are pointed up however by the case of State v. Tiedt, 229 S.W.2d 582 (Mo. banc 1950), a death-penalty case under our old law, when it is compared with the specific requirements of §§ 565.012.4 and 565.012.5, RSMo 1978.

In Tiedt, a jury found Tiedt guilty of "old" first-degree murder and assessed punishment at death. The only other penalty available was life imprisonment, § 559.030, supra, repealed. On appeal the defendant contended the trial court erred in refusing a certain instruction he tendered which would have told the jury that "' . . . the law relative to the right to receive the benefit of the doubt as to the severity of punishment'; that, if defendant was guilty of murder in the first degree, 'he was entitled to the benefit of a reasonable doubt * * * as to whether he should be given the death penalty or given a life sentence'; and that the 'same benefit of reasonable doubt should apply in fixing punishment as well as in determining whether any punishment should be assessed.'" Id. 585-6.

This Court held at 586: "The instruction was properly refused. If, under the evidence and instructions of the court, the jury found defendant guilty of murder in the first degree, it was for the jury to fix the punishment. The matter of punishment, within the limits fixed by the statute, was solely within the discretion of the jury under all of the facts and circumstances in evidence. Secs. 4378, 4092, R.S. 1939, Mo.R.S.A.; State v. Bevins, 328 Mo. 1046, 43 S.W.2d 432, 434; State v. Creighton, 330 Mo. 1176, 52 S.W.2d 556, 563; Ex parte Dusenberry, 97 Mo. 504, 11 S.W. 217. No question of reasonable doubt was involved in the matter of assessing the punishment. People v. Krauser, 315 Ill. 485, 146 N.E. 593, 605." (Emphasis added.)

The concept set forth in Tiedt that the death penalty could be validly imposed without any standards or directions was again approved in State v. Coleman, 460 S.W.2d 719 (Mo. banc 1970). But it was precisely

this "unbridled discretion" which caused the Supreme Court of the United States to declare this procedure unconstitutional in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). For a more detailed discussion of what was required by Furman and its progeny, see State v. Duren, 547 S.W.2d 476 (Mo.banc 1977), where this Court held unconstitutional a mandatory death penalty for capital murder.

The Missouri General Assembly subsequently adopted the present law. The essential and substantive difference is that, at least where the death penalty is a possibility, the jury first decides whether the defendant is guilty or not guilty of capital murder. Of course the state has the burden of proof and the defendant has the benefit of reasonable doubt. If the defendant is found guilty of capital murder, then the second stage of the trial takes place. Sec. 565.006, RSMo 1978. This is completely new in our criminal jurisprudence. Sections 565.012.4 and 565.012.5, RSMo 1978, require that before a death penalty can be assessed the jury must again be properly instructed, must find beyond a resonable doubt that at least one of the statutory aggravating circumstances exist, and must designate its finding in writing.

As pointed out in the dissent of Seiler,J., the instructions make it clear that the law requires that aggravating circumstances must be based on evidence and that the burden of proof is upon the state to prove the same beyond a reasonable doubt. MAI-CR 2d 15.40 and MAI-CR 2d 15.42.

The law requires affirmative findings beyond a reasonable doubt stated in a special verdict form before a death penalty can be imposed by the jury. The death penalty cannot result from a negative finding. The effect of our capital-murder law is that capital murder, without more, is punishable by life imprisonment without parole for fifty years. Capital murder plus an additional verdict of aggravating circumstances authorizes but even then does not compel the death penalty.

In view of the manner in which the legislature has dealt with the punishment for capital murder, which requires a separate finding and verdict by the jury if the death penalty is to be imposed, and because this is a new and unique procedure, we ought not try to fit this into any traditional molds of lesser-included offenses or degrees of homicide. The legislature has already done that by making significant and substantive differences in the penalty section of the capital-murder statutes. They have treated the death penalty as a punishment which is unique unto itself and not comparable to any term of imprisonment.

Under our capital-murder statutes, the crime may be punished by death if, and only if, the state carries its burden of proving beyond a reasonable doubt an element which is not necessarily part of the definition of capital murder. The jury does not decide this additional element when determining whether the defendant is guilty of capital murder. That additional element is the presence of a "statutory aggravating circumstance" which the jury may consider only <u>after</u> it finds the defendant guilty of capital murder and then only in those cases where the death penalty is sought. Thus what we have in Missouri is (1) capital murder punishable only by life imprisonment without parole for fifty years, and (2) capital murder plus at least one aggravating circumstance which may be but is not required to be punishable by death.

In this case the jury has already acquitted the defendant of whatever was necessary to impose the death sentence. This was done in a separate trial or hearing devoted only to that matter and in which the state had the burden of proof and the defendant had the benefit of reasonable doubt. Although it does not fit nicely into traditional concepts, it is clear that the jury has acquitted on the death penalty and the defendant is therefore not subject to retrial on that issue.

In short, the new capital-murder statutes allow a defendant to be placed in jeopardy of conviction of capital murder and then, after conviction, allow a defendant to be placed in additional and separate jeopardy of the death penalty. And this defendant, after being placed in such additional and separate jeopardy of being put to death, was acquitted of that death penalty.

I therefore dissent and would quash the preliminary rule in prohibition.

JOHN E. BARDGETT, Chief Justice.

THIS OPINION IS THE
MODIFIED DISSENTING OPINION
FILED ON MARCH 11, 1980.

Supreme Court of Missouri

en banc

DUPLICATE
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MAR 11 1980
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STATE ex rel. GEORGE R. WESTFALL,)
)
Relator,)
)
v.) No. 61499
)
HON. DONALD L. MASON, Judge, 16th)
Judicial Circuit,)
)
Respondent.)

DISSENTING OPINION

I respectfully dissent. The case at bar presents a defendant who was convicted of capital murder in a bifurcated trial wherein the jury first decides his guilt and, after finding him guilty, in a second stage decides whether the death sentence will be imposed. In this second stage, pursuant to statute, the state presented evidence of aggravating circumstances and the defendant presented evidence of mitigating circumstances for the jury's consideration in determining whether to impose the death sentence. The jury determined a single issue, whether the facts marshalled by the state affirmatively justified the imposition of the death sentence on Robert Bullington.[1] The jury found against the state, deciding that none of the possibilities presented warranted the death sentence. The state now demands that it again be permitted to present the same facts to a second jury with the hope that the new jury will decide to execute the defendant.

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1. The Missouri Approved Criminal Instruction submitted to the jury for this finding, MAI-CR 15.40 "Guilty of Capital Murder: Statutory Aggravating Circumstance - Finding Required for Death Penalty," with the two aggravating circumstances proffered by the prosecuting attorney would have read as follows:

"In determining the punishment to be assessed (under Count ____) against the defendant for the

(Continued)

Three times during his oral argument before this court, the prosecuting attorney conceded that the state would offer the same evidence in support of its demand that Robert Bullington be sentenced to death.[2] The principal opinion will permit the state to relitigate a jury's determination that the death sentence is inappropriate whenever a defendant sentenced to life imprisonment succeeds in overturning an unconstitutional capital conviction.

The principal opinion does not distinguish the very different cases presented by single stage trials and the bifurcated trial required for the imposition of the death penalty. By not distinguishing the cases, the analysis overlooks the unanimous authority denying

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(Continued)

> murder of [*name of victim*], you must first unanimously determine
>
> "Whether the defendant has a substantial history of serious assaultive convictions.
>
> "Whether the murder of [*name of victim*] involved torture or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.
>
> "You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.
>
> "Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence."

2. The statement in the principal opinion that it is speculative as to what the state's evidence on aggravation will be on retrial is contradicted by the statements of the prosecuting attorney who will again try the case for the state. There is no reason why we should doubt the prosecutor's knowledge of his case.

the state a second jury determination as to the death penalty once a jury singularly and affirmatively finds that the defendant is not to be put to death. The cases cited as authority in the principal opinion go back more than fifty years, long prior to establishment of present day standards and requirements which make a death penalty case unique. There has never been anything like it before. The cases relied on by the principal opinion all involve single stage proceedings and do not encompass or address in any respect the issues and complexity presented by the two separate trial stages required by the more recent United States Supreme Court cases for conviction and sentencing of the capital murder offense. The only cases directly in point, not all of which are discussed by the principal opinion, reach an opposite result.

I

In 1976, the United States Supreme Court upheld the constitutionality of Georgia's bifurcated trial procedure for capital offenses in Gregg v. Georgia, 428 U.S. 153 (1976). In a companion case, Woodson v. North Carolina, 428 U.S. 280 (1976), the Supreme Court held unconstitutional North Carolina's mandatory death penalty statute for first-degree murder. In Woodson, the plurality opinion stated that the Constitution requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." 428 U.S. at 303.

In 1977, the Missouri legislature enacted a bifurcated trial procedure for capital offenses, now §§ 565.008 and 565.012, RSMo 1978, patterned on the Georgia statute upheld in Gregg. The Georgia statute, Ga. Code §§ 27-2503 and 27-2534.1 (1975), provides for a trial in two stages, one for a determination of guilt, and a second for a determination as to whether the degree of the convicted defendant's guilt justifies his execution. Under both statutes, a jury that convicts a defendant of capital murder in the first stage must then in the second stage hear new evidence and determine whether the defendant's guilt will be punished by a life sentence or whether his guilt is such that he should be put to death.

In the instant case, the principal opinion apparently finds that this determination by the jury in the second stage of trial is merely assigning punishment within the range provided by statute and not a finding of what is required to justify the death penalty. But in Woodson, the Supreme Court rejected this view: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two." 428 U.S. at 305 (emphasis added).

The principal opinion makes much of the fact that there is but one crime of capital murder and refuses to acknowledge that the statutory framework treats capital murder markedly different than any other crime. It is true that § 565.001, RSMo 1978, defines capital murder. But taken alone it is incomplete. Without a penalty being prescribed, it is no more than an abstract declaration of law. A killing may be unlawful, willful, knowing, deliberate and premeditated, yet that is not all capital murder encompasses. In addition to guilt, there must also be found by the jury, beyond a reasonable doubt, aggravating circumstances which the jury must designate in writing in its verdict. Capital murder is meaningless without the punishment. There is no such thing as a conviction of capital murder per se without more. It has to be either capital murder with death or capital murder with life imprisonment, without probation for fifty years, etc. This does not "rend" the crime of capital murder. Rather, it recognizes what we all know to be the fact.

The statutes dealing with the crime provide for a unique two stage proceeding and require that the jury must affirmatively find beyond a reasonable doubt additional aggravating circumstances before it can impose the death penalty. By requiring that the additional element of aggravating circumstances be proven beyond a reasonable doubt for the imposition of the death penalty, the statutory framework effectively establishes the crime of aggravated capital murder

punishable by death and the crime of capital murder punishable by life imprisonment without the possibility of probation or parole for fifty years. The legislature had no choice but to enact two degrees of punishment for the crime of capital murder. Had the legislature separated the degrees into two separate offenses, with one of a higher degree punishable only by death, the statute would have been unconstitutional under Woodson as a mandatory death penalty statute.

Accordingly, this case presents much more than the potential for enhanced punishment upon retrial under a single-verdict procedure. The issue in this case is whether, under the bifurcated trial procedure for capital cases, the state can ignore the jury's implicit acquittal of the defendant of what is required to justify imposition of the death penalty and on retrial once again ask a jury to find what it considered and declined to find in the first trial.[3]

The principal opinion would smudge the question of what issue the jury decided in the first trial when it gave defendant life imprisonment instead of death. The principal opinion speculates that perhaps the jury "intuitively" found the mitigating circumstances outweighed the aggravating circumstances or that perhaps the jury's "predilections as to mercy" explain the verdict or that perhaps it was in response to "a defendant's plea for mercy rather than finding no aggravation." There is no way we can know what may have subjectively impelled the jury to reject death and agree on life imprisonment. What we do know is that the jury has resolved the issue under instructions which, as pointed out below, presented it with a single, narrow issue for decision. The only "single rationally conceivable issue in dispute before the jury", Ashe v. Swenson,

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3. Even a cursory glance at the Missouri Approved Criminal Instructions for the second stage in capital murder trials, after a jury has already convicted the defendant, indicates that a jury determination to impose a life sentence is an implied acquittal of the aggravated capital murder which would justify the imposition of the death penalty. The "Supplemental Notes on Use Applicable to the 15.00 Series of MAI-CR" (for homicides committed after May 25, 1977) requires the reading of: MAI-CR 15.30, 15.32 and 15.34 in the opening of the second stage before the presentation of evidence; MAI-CR 15.36 after the presentation of evidence and before argument; and, MAI-CR 15.38, 15.40, 15.42, 15.44, 15.46 and 15.48 after argument. Finally, a special verdict form, MAI-CR 15.56.2, is presented to the jury for its determination of the question.

397 U.S. 436, 445 (1969), after guilt was decided, was whether this defendant was to receive death or life imprisonment under the terms and conditions of the instructions given.

MAI-CR 15.30 instructs the jury that "at this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for the offense."

MAI-CR 15.32 instructs the jury it is to go to the jury room, "deliberate and arrive at your verdict fixing the punishment to be imposed upon the defendant."

MAI-CR 15.36 instructs the jury "it is your duty and yours alone to decide upon the punishment to be imposed upon the defendant. . ."

MAI-CR 15.40 concludes by instructing the jury, "Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that the foregoing circumstance exists and that it is an aggravating circumstance,[4] you must return a verdict fixing the punishment of the defendant at imprisonment for life. . ."

The same is true with respect to MAI-CR 15.42, which requires a verdict of life imprisonment if the jury does not find the aggravating circumstances are sufficient to warrant death.

MAI-CR 15.44 requires the jury to return a verdict of life imprisonment if the mitigating circumstances outweigh the aggravating circumstances.

Finally, MAI-CR 15.46 tells the jury that even if the mitigating circumstances do not outweigh the aggravating circumstances, the jury is not compelled to arrive at a death verdict.

Therefore, the verdict of life imprisonment in the first trial had to mean one of four things:

1. The jury did not find aggravating circumstances, or
2. It did not find the aggravating circumstances were sufficient to warrant death, or
3. The mitigating circumstances outweighed the aggravating circumstances, or
4. Even if they did not, the aggravating circumstances were not sufficient.

4. The instruction can be reworded slightly to cover the situation where there are several aggravating circumstances submitted, at least one of which must be found.

To use the language of Ashe, supra, this jury, under the instructions, could not have grounded its verdict as to life or death upon an issue other than that which the defendant seeks to foreclose from consideration - namely, that under the facts presented by the state, which the prosecution says will be the same on retrial, none of the possibilities warranting the death sentence existed.

This case raises squarely the issues of the rule of collateral estoppel embodied in the fifth amendment guarantee against double jeopardy as enunciated in Ashe v. Swenson, supra. In Ashe, the Supreme Court held that the applicability of the rule in criminal cases "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" 397 U.S. at 444 (citing Sealfron v. United States, 332 U.S. 575, 579). Viewed with an eye to all the circumstances of the proceedings, the case at bar presents a prior jury determination of "the single rationally conceivable issue in dispute", whether the defendant's guilt was such as to justify the death penalty. See Ashe, Id. at 445. Because the jury in the second stage of the trial found that the aggravating circumstances were either not present or were insufficient, the state should not be given a second chance to present the question to another jury.

II

Three state supreme courts have addressed the precise issue before this court, each of which held impermissible the state's attempt to relitigate at a second trial whether the convicted defendant's guilt justified the death penalty after the first jury decided the death penalty was not justified. Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977); Commonwealth v. Littlejohn, 433 Pa. 336, 250 A.2d 811 (1969); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

In Ward v. State, supra, the Georgia Supreme Court found the imposition of the death penalty in the second trial unlawfully disproportionate to the life sentence imposed by the first jury. The court found the disparity in sentences impermissibly dispropor-

tionate under Ga. Code § 27-2537(c)(3)(1975), which is word for word the same language contained in Missouri's statute providing standards for review of death penalty cases, § 565.014.3(3), RSMo 1978, as well as under the United States Supreme Court's standards in Gregg v. Georgia, supra.[5] The Georgia court concluded:

> "The same defendant was tried previously on the same charges and the jury imposed a life sentence. Therefore the death sentence in the case under review is obviously disproportionate to the life sentence previously imposed against the same defendant in the same case. Accordingly, the law requires us to vacate the death sentence and direct the impositon of a life sentence. . . . To do otherwise would be incongruous and contrary to the clear mandate of the law. For as was said by the United States Supreme Court in Gregg, '[t]he provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by action of an aberrant jury.' Gregg, supra, 428 U.S. at 206, 96 S.Ct. at 2940."

236 S.E.2d at 368. Because the Georgia and Missouri statutes providing standards for review of death penalty cases are almost identical, this case is certainly persuasive authority for denying the state on retrial a second chance to litigate its demand that the defendant be put to death once the first jury decides the issue against the state.

In the case at bar, the principal opinion attempts to distinguish the Ward case "in that the evidence had been presented at the subsequent proceeding and that evidence 'was essentially the same' as that presented at the first trial where the jury did not recommend a sentence of death." But as noted above, the prosecuting attorney in this case conceded during oral argument that the state's evidence in a second trial would be the same as that presented at the first trial. The principal opinion also says that the fact the "notice" required by §565.006-2 as given in the instant case contains the same general averments of aggravation as

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5. In Gregg v. Georgia, 428 U.S. 153, 187 (1976), the Supreme Court held, among other things, that the imposition of the death penalty cannot be disproportionate in relation to the crime for which it is imposed.

the earlier notice should not be held to foreclose additional proof within the scope of the notice. But that is not defendant's contention. The prosecuting attorney, himself, has told us that the state's evidence in the second trial will be the same as that presented at the first trial. It is not a matter of what the scope of the notice allows. The fact is that the prosecutor, who is in a better position to know than we are, has conceded the evidence will be the same. This makes the cases virtually identical and the result reached in Ward all the more persuasive.

In Commonwealth v. Littlejohn, supra, the Pennsylvania Supreme Court held that the constitutional provisions relating to due process, equal protection and double jeopardy precluded the Commonwealth from seeking the death penalty in a second bifurcated trial against a defendant sentenced to life imprisonment in the first trial. The court found that exposing a defendant who appeals from a life sentence to a second possibility of receiving the death sentence at a new trial violates due process by conditioning the right of appeal.

> "The prisoner must decide whether to abandon his constitutional right to a fair trial and serve out his prison term under an invalid or unchallenged sentence, or exercise his statutory right to appeal in order to achieve his constitutional right to a fair trial, at the risk that his second trial might result in the imposition of the death penalty. This makes the price of appeal from an erroneous judgment in a first degree murder case the risk of a man's life. . . ."

250 A.2d at 813-14. The court found that "this choice not only shocks the conscience and offends our sense of justice, but also rises to an unconstitutional condition" under United States v. Jackson, 390 U.S. 570 (1968).[6] Id. at 814.

The Pennsylvania court also found a violation of equal protection on the ground that of all defendants sentenced to life imprisonment, only those who appealed their sentences would be singled out for the possible imposition of the death penalty:

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6. In United States v. Jackson, 390 U.S. 570 (1968), the Supreme Court held invalid as an unconstitutional condition a provision in the Federal Kidnapping Act, 18 U.S.C. § 1201(a), which provided that a defendant who chose to be tried by a jury was subject to the death penalty, but a defendant who waived his right to a jury trial gained immunity from the death sentence.

> "It is our view that the equal protection clause of the fourteenth amendment also prohibits the Commonwealth from imposing the threat of the death penalty on those who have been convicted of first degree murder and sentenced to life imprisonment. . . . [I]nstead of choosing a group for sentence review on the basis of some factor which bears a rational connection with the purpose of review, this system employs a completely irrational standard for choosing those whose sentences may be changed.
>
> "Further, . . . if the Commonwealth's purpose is to eliminate frivolous appeals, employing the deterrent of an increased sentence does not represent a rational standard. . . . The device of the threat of the death penalty does not bear any reasonable relation to the frivolousness or merits of the appeal."

250 A.2d at 815.

In Littlejohn, the Pennsylvania court also found a violation of the double jeopardy clause under the principle enunciated in Green v. United States, 355 U.S. 184 (1957). In Green, the United States Supreme Court held that a defendant, who had been convicted of second degree murder and successfully had that conviction reversed, could not be tried again for first degree murder. The court reasoned that the first jury, by returning a verdict of second degree murder, had impliedly acquitted the defendant of the first degree charge. In applying Green to the bifurcated trial and circumstances presented in Littlejohn (the circumstances presented this court in the case at bar), the Pennsylvania Supreme Court held that the double jeopardy clause prevented a prosecution for the higher punishment, namely, death rather than imprisonment, once the defendant has been convicted of and received the less severe punishment. Id. at 816.

In People v. Henderson, supra, the California Supreme Court held that in a bifurcated trial the prohibition against double jeopardy precluded the imposition of a death sentence upon a defendant after the reversal of the first judgment sentencing him to life imprisonment. Mr. Justice Traynor, writing for the court, reasoned that since Green v. United States, supra, established that a reversed conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial, "[i]t is immaterial to the basic purpose of the constitutional provision

against double jeopardy whether the legislature divides a crime into different punishments or allows the court or jury to fix different punishments for the same crime." 386 P.2d at 686. The California court also found that the death penalty threat imposed unreasonable conditions on the right to appeal:

> "A defendant's right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal."

Id.

The principal opinion does not discuss the Littlejohn and Henderson cases.

In the case at bar, the principal opinion relies on Gully v. Kunzman, 592 F.2d 283 (6th Cir.) cert. denied, 99 S.Ct. 2850 (1979) as authority for its statement that the fifth amendment does not forbid imposition of the death penalty on retrial of defendant for an offense upon which he was originally sentenced to life. But the Gully decision did not involve a bifurcated trial with a second stage for determining whether the degree of guilt justified the death penalty:

> "The new death penalty statute was not employed at petitioner's first trial. Indeed, the option of sentencing petitioners to death was not even submitted to the sentencing authority at the trial. Accordingly, the fact that petitioners received only a life sentence after the first trial cannot be interpreted as 'an implicit acquittal' of the 'greater' offense created by the new death penalty law. See Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)."

592 F.2d at 289 (emphasis added). Because Gully did not involve a specific jury finding that the defendant's degree of guilt did not justify the imposition of the death penalty, the Gully case is clearly distinguishable.[7] In fact, the Gully case actually supports the view

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7. For the same reason, the principal opinion places undue reliance on Stroud v. United States, 251 U.S. 15 (1919) and Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (a robbery conviction that did not involve the imposition of the death penalty, both cases involving only single stage trials).

(Continued)

that, in a bifurcated trial, the imposition of a life sentence by the jury in the second stage is for the purposes of double jeopardy analysis an implied acquittal of aggravated capital murder punishable by death:

> "We do not think this analysis far-fetched, since, under the new scheme, a defendant convicted of a capital offense may not be sentenced to death except upon a finding, 'beyond a reasonable doubt,' of certain statutorily-prescribed 'aggravating factors.' These 'factors' might be conceived of as elements of the 'greater' crimes of 'captial murder/armed robbery' rather than simply as guides for the exercise of the sentencing authority's discretion to fix an approximate punishment for one convicted of 'simple' willful murder and armed robbery."

Id. In any event, Gully is not authority for permitting the state to expose the defendant to the risk of the death penalty after a jury has implicitly acquitted him of guilt justifying the imposition of the death sentence.

As the review of the Ward, Littlejohn, Henderson and Gully cases indicates, the case at bar presents questions of due process, equal protection, and double jeopardy. I am convinced that the second exposure of this defendant to the potential of the imposition of the death penalty, after a jury in the second stage of a bifurcated trial singularly and affirmatively decided that the defendant is not to be put to death, would violate the fifth and fourteenth amendments of the United States Constitution, the due process clause of the Missouri Constitution, art. I, § 10, and § 565.014.3(3), RSMo 1978.

(Continued)

The principal opinion contends that Chaffin, despite the fact it involved only a single stage trial, nevertheless supports the proposition that the state may again seek the death penalty when defendant is tried before the second jury in the case before us, pointing out that Chaffin said that "bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing."

There was no bificurated trial in Chaffin and the Chaffin opinion does not purport to deal with the problems which are raised by the instant case, tried as it was under our system of instructions which focus the jury upon a single issue in the second stage proceedings, as discussed earlier herein.

III

The result reached in the principal opinion infringes upon both the right to appeal and the right to a jury trial. Moreover, this result is fundamentally unfair where, as here, the necessity of the second trial is caused by the state's errors.

A

The Bill of Rights portion of the Missouri Constitution provides in art. I, § 14 "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person. . ." This section has been interpreted by this court "to protect citizens in enforcing rights recognized by law, without discrimination." Schulte v. Missionaries of LaSalette Corporation, 352 S.W.2d 636, 641 (Mo. 1961). In the case at bar, the defendant was originally convicted unconstitutionally and he succedded in overturning his conviction. His right to a fair trial had been denied him. The principal opinion effectively holds that this defendant, and others similarly spared the death sentence by a jury in the second stage of a capital trial, must forfeit the jury's implied acquittal of the death penalty in order to challenge an unconstitutional conviction. This result obviously discriminates against persons who attempt to enforce their rights to be free from unconstitutional convictions. This discrimination and infringement upon the right of appeal, by forcing a person unconstitutionally convicted to risk the imposition of the death sentence in order to vindicate his rights, violates Mo. Const. art. I, § 14.

B

Aside from infringing the right of appeal, the result reached under the principal opinion will chill the exercise of defendant's right to a jury determination in the second stage of trial. This result will arise when the defendant is forced to choose whether he will exercise his right to a jury trial or settle for sentencing by the trial judge to avoid the possible imposition of the death penalty upon retrial.

In North Carolina v. Pearce, 395 U.S. 711 (1969), the United States Supreme Court held that when a defendant has succeeded in obtaining a new trial, the due process clause prevents a sentencing judge from imposing a harsher sentence on the defendant if he is convicted in the second trial, absent any identifiable misconduct by the defendant between the time of the first and second trial. The Supreme Court held:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

395 U.S. at 725-26.

The general sentencing provisions of the new criminal code permit a defendant to request "in writing that the court assess punishment in case of a finding of guilt" by the jury. § 557.036.2, RSMo 1978. If the defendant waives jury sentencing and, therefore, is sentenced instead by the judge in the event of a finding of guilt, the judge will be bound by the holding of North Carolina v. Pearce, supra. Accordingly, a defendant given life imprisonment by the jury after a capital conviction may, if he succeeds in obtaining a new trial, limit the maximum sentence in the second trial to life imprisonment by waiving jury sentencing in the second trial.[8]

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8. This strategy forces the defendant to run the risk, however, that if the jury in the second trial finds the defendant guilty of a non-capital offense, the judge may impose a harsher sentence than the jury would have imposed on him.

As a result of the holding in the principal opinion, a defendant who obtains a new trial after being sentenced to life imprisonment in a bifurcated capital murder trial will be forced, in the second trial, to waive his right to jury trial guaranteed under the sixth amendment, Duncan v. Louisana, 391 U.S. 145 (1968), the Missouri Constitution, art. I, § 22(a), to avoid putting his life in jeopardy once again. Only if the defendant waives his right to a jury determination in the second stage of trial can he avoid being forced to run the gauntlet until the state succeeds in its efforts to take his life. Consequently, the result reached today erects the same framework impairing the right to a jury trial which was held unconstitutional in United States v. Jackson, supra.

In Jackson, the United States Supreme Court held unconstitutional the provision in the Federal Kidnapping Act, 18 U.S.C. § 1201(a), which provided that a defendant who chose to be tried by jury was subject to the death penalty, but a defendant who waived his right to a jury trial gained immunity from the death penalty. Like the defendant in Jackson, the defendant in the case at bar is subject to the death penalty if he chooses to be tried by jury in the second stage of trial, but gains immunity from the death penalty if he waives his right to jury sentencing. As in the unconstitutional framework in Jackson, under today's decision the defendant, if "ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." 390 U.S. at 581. But the Supreme Court found this result "needlessly chill[s] the exercise of basic constitutional rights." Id. at 582.

C

There is another consideration, too. It is basically unfair to permit the state, after it has failed to obtain a death sentence, and after a new trial has been awarded because of the state's errors, to keep trying the defendant over and over for the death penalty. Even where his life is at stake, the defendant cannot match the resources of the state and sooner or later the state will prevail.

The principal opinion contends that if the first jury's decision on punishment binds any later jury, "the argument could be made that if the first jury decided on death as an appropriate sentence the second jury's consideration would be limited to only that punishment." While there may be surface appeal in this proposition, the argument ignores long-standing constitutional principles. In United States v. Ball, 163 U.S. 662, 671 (1896), the United States Supreme Court unequivocally stated that a "verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." And in Green v. United States, supra, the Supreme Court made clear that an implied verdict of acquittal of a greater offense, as when the jury convicts the defendant of a lesser offense, enjoys the same finality and insulation from review as an outright acquittal. In the case at bar, the court is presented with the jury's implied acquittal of capital murder with the death penalty, as the jury refused to find in the second stage of trial that the state's proffered aggravating circumstances justified putting the defendant to death.

The Missouri capital murder statutes require that the jury pass on whether defendant is to be found guilty of capital murder with the death penalty or capital murder with life imprisonment without eligibility for probation or parole for fifty years. Once the issue is decided in the defendant's favor, whether by an outright acquittal as in United States v. Ball, supra, or by an implied acquittal as in Green v. United States, supra, the dispute as to the question is ended "then and there." See United States v. Jorn, 400 U.S. 470, 484 (1971). "[T]here is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous,' . . . the legal rulings leading to that judgment might be." Sanabria v. United States, 437 U.S. 54, 75 (1978). In Green, the Supreme Court flatly rejected the government's contention that the defendant

"must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced. . ." 355 U.S. at 193-94.

In any event, it would not be sound for the court to decide the actual issues presented in this case on the basis of speculation as to the result we would reach in a hypothetical case. The principal opinion has postulated a nonexistent contingency - that of a case where defendant was given death - different from the facts before us, the legal questions of which nonexistent case have neither been briefed nor argued. If this anticipated issue were to arise, this court may decide the case after the issue is timely briefed and argued. I would decide the question when it arises; it is not an issue in this case.

V

Although the principal opinion states at the outset that the "principal question for our determination is whether on retrial the death penalty . . . is barred as possible punishment by constitutional or statutory consideration"[9] and concludes that the trial court would be exceeding its authority in denying the state leave to seek imposition of the death penalty on retrial and hence prohibition lies, the opinion also addresses the constitutionality of the death penalty. That point is not raised in relator's original brief in any way. Counsel for respondent in his brief predicts that the death penalty will in due course be held unconstitutional, but that they will "say no more here than enough to make the point, in order to preserve it for appeal" (obviously referring to the appeal which may come after the retrial of the capital murder case), and then argues that §565.012.2(7), RSMo 1978, one of the statutory aggravating circumstances proffered by the state in its effort to impose the death penalty on defendant, is unduly broad and vague. Relator, then, in his reply brief "suggests that the instant proceeding is not the proper time to

9. It is important to bear in mind that the constitutional issue referred to is not the constitutionality of the death penalty, but whether it is constitutional to subject defendant to the death penalty on retrial after the jury in the first trial had rejected the death penalty and given the defendant life imprisonment.

consider th s particular issue. Whether the statute is overly broad can be better determined when the Court has a case on appeal with a full transcript of the proceedings to assist it." Neither side purports to have briefed or argued these last two constitutional questions thoroughly or adequately.

The present action is in prohibition and once the question of whether the trial judge will exceed his jurisdiction if he goes through with his intention to sustain defendant's motion to strike is determined, the prohibition action is settled. Clearly respondent is not contemplating making that order for the reason he considers the death penalty unconstitutional, because he permitted the death penalty issue to be tried in the first trial. Respondent is contemplating making the order for the reason that defendant was subjected to the death penalty in the first trial, but the jury rejected it, and hence defendant cannot be subjected to it again in the second trial, respondent believes. To go further and reach out to decide the constitutionality of the death penalty under art. I, § 21 of the Missouri Constitution is to violate our long established rule that we abstain from passing on constitutional questions which are unnecessary to a disposition of the case. See the many cases so holding collected in 7 West's Missouri Digest, Constitutional Law, Key No. 46 (1).

I would await a case where the death penalty is squarely before us on direct appeal, with adequate briefing and argument, to pass on its constitutionality. We should not casually foreclose a question of this magnitude.

Additionally, the questions of whether the statutory aggravating circumstances are unconstitutional as unduly broad and vague, and whether the death penalty would be unconstitutional as cruel and unusual punishment if applied to this defendant are questions not ripe for adjudication, as this defendant has yet to stand trial, and we do not know what the outcome of the second trial may be. Defendant may

not receive the death penalty in a second trial, even if the present case goes against him, nor do we know what evidence defendant may offer as to the cruel and unusual aspects of the death penalty. These are all questions properly addressed on appeal. "[P]rohibition cannot be substituted for an appeal." State ex rel. Vogel v. Campbell, 505 S.W.2d 54, 58 (Mo. banc 1974). I would quash the preliminary rule.

Robert E. Seiler, Judge

EXHIBIT C

INSTRUCTION NO. 30

You have found the defendant guilty of capital murder. At this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

The punishment prescribed by law for capital murder is either death or imprisonment for life by the Division of Corrections without eligibility for probation or parole until the prisoner has served a minimum of fifty years of his sentence.

MAI-CR 15.30

INSTRUCTION NO. 37

This stage of the trial will proceed as follows:

First, the Court will read to you one further instruction of law for your guidance. Next, the attorney for the state must make an opening statement outlining what evidence the state expects to introduce at this time with respect to the punishment to be imposed. The defendant's attorney is not required to make an opening statement then or at any other time. However, if he chooses to do so, he may make an opening statement after that of the state, or he may reserve his opening statement until the conclusion of the state's evidence.

Evidence will then be introduced which, with the evidence you have already heard, may be considered by you insofar as it bears upon the punishment to be fixed by the jury.

Next, the attorneys may make their arguments to you regarding the punishment to be imposed, after which the Court will read to you further written instructions concerning the law applicable to this stage of the proceedings.

You will then be given the written instructions of the Court to take with you to your jury room. You will go to that room, deliberate and arrive at your verdict fixing the punishment to be imposed upon the defendant.

MAI-CR 15.32

It is your duty to follow the instructions and the law as the Court gives them to you. However, no statement, question, ruling or remark that I have made or may make during the entire trial is intended to indicate my opinion of what the facts are or what the punishment should be. That will be your responsibility. In performing that duty you alone must decide upon the believability of the witnesses and the weight and value of the evidence.

You will recall that the Court told you at the first stage of this trial that you must not assume as true any fact solely because included in or suggested by a question asked a witness. A question is not evidence, and may be considered only as it supplies meaning to an answer.

MAI-CR 15.34

You will now hear argument by the prosecuting attorney and by counsel for the defendant regarding the punishment to be imposed. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed by the evidence as you remember it, the reasonable inferences which you believe should be drawn, and the law as given in instructions of the Court.

After counsel have argued the matter, the Court will give you further and final instructions concerning the law relating to the punishment. It is your duty and yours alone to decide upon the punishment to be imposed upon the defendant and to render such verdict under the law and the evidence.

The state's attorney must open the argument. Counsel for the defendant may then make his argument. No further argument is permitted by either side.

MAI-CR 15.36

The law applicable to this stage of the trial is stated in these instructions and those which were read to you when we began this phase of the case. All of these instructions will be given to you to take to your jury room for use during your deliberations.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

I do not mean to assume as true any fact referred to in these instructions but leave it to you to determine what the facts are and what the punishment should be.

MAI-CR 15.38

In determining the punishment to be assessed under Count I against the defendant for the murder of Pamela Sue Wright, you must first unanimously determine:

1. Whether the defendant has a substantial history of serious assaultive convictions.

2. Whether the murder of Pamela Sue Wright involved depravity of mind and that as a result thereof it was outrageously or wantonly vile or horrible or inhuman.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled fix death as the punishment. Whether that is to be your final decision rests with you.

INSTRUCTION NO. _____

If you find and believe from the evidence beyond a reasonable doubt that one or more of the circumstances submitted in Instruction No. _____ exists and that at least one of them is an aggravating circumstance, it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of defendant. In deciding that question you may consider all of the evidence relating to the murder of Pamela Sue Wright.

You may also consider any of the aggravating circumstances referred to in Instruction No. _____ which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

MAI-CR 15.42

You will be provided with forms of verdict for your convenience. You cannot return any verdict as the verdict of the jury unless all twelve jurors concur in and agree to it, but it should be signed by your foreman alone.

If you decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Pamela Sue Wright, your foreman must write into your verdict all of the aggravating circumstances submitted in Instruction No. _____ which you found beyond a reasonable doubt.

If, after considering all of the evidence and instructions of law, you decide that the defendant must be punished for the murder of Pamela Sue Wright by imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence, your foreman will sign the verdict form so fixing the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the court will fix the defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.

VERDICT FORM

Jurors: Use this form only if the punishment fixed by you is death. See Instruction No. _____ for directions as to what must be written into the verdict form if the death penalty is imposed. Use the reverse side of this form if necessary. The foreman's signature must appear at the end of the matter which you designate in writing as the aggravating circumstance or circumstances which all twelve jurors found beyond a reasonable doubt.

As to Count I, we, the jury, having found the defendant guilty of the capital murder of Pamela Sue Wright, fix the defendant's punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

MAI-CR 15.56

VERDICT FORM

As to Count I, we, the jury, having found the defendant guilty of the capital murder of Pamela Sue Wright, fix the punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until the defendant has served a minimum of fifty years of his sentence.

_____
FOREMAN

MAI-CR 15.56

As to Count I, we, the jury, having found the defendant guilty of the capital murder of Pamela Sue Wright, are unable to agree upon the punishment.

FOREMAN

MAI-CR 15.56

EXHIBIT D
AMENDMENTS TO THE UNITED STATES CONSTITUTION

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.